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In The
Supreme Court of the United States

FULLER-AUSTIN INSULATION COMPANY, f/b/o FULLER-AUSTIN ASBESTOS SETTLEMENT TRUST,

Petitioner,

v.

HIGHLANDS INSURANCE COMPANY, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The California Court Of Appeal, Second Appellate District, Division Two

PETITION FOR A WRIT OF CERTIORARI AND APPENDIX VOLUME I, Pages 1 to 121

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QUESTION PRESENTED

Section 524(g) of the Bankruptcy Code is Congress' lone response thus far to the Nation's asbestos litigation crisis. It authorizes the creation of asbestos trusts to pay the claims of present and future claimants injured by exposure to the asbestos products of the bankrupt defendant. Such trusts are funded by the assets of the bankrupt defendant, often (as in this case) including the proceeds of general liability insurance policies. In order to ensure the equitable treatment of all asbestos victims (whose injuries often take many years to manifest themselves), Section 524(g) requires such trusts to treat present and future claimants alike. Accordingly, when such a trust's total projected liabilities exceed its anticipated assets, the trust must discount the payments otherwise owing to present beneficiaries in order to ensure that the trust will have sufficient assets to pay allowed claims of future claimants in like amounts. The California court below, expressly rejecting the reasoning of the Seventh Circuit, held that a trust's adherence to Section 524(g) effectively limited the liability insurers' coverage obligation to the discounted amounts paid to claimants by the trust (rather than the allowed value of the asbestos victims' claims). The question presented is:

Does Section 524(g) preclude reduction of the amount of insurance monies otherwise due and owing to an asbestos trust because the trust has discounted payouts to present claimants in order to preserve available assets for future claimants?

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the following parties were Defendants-Appellants in the California Court of Appeal, and are Respondents in this Court: Columbia Casualty Company, Continental Casualty Company, Transcontinental Insurance Company, Certain Underwriters at Lloyd's London and Certain London Market Insurance Companies, First State Insurance Company, New England Reinsurance Company, Twin Cities Fire Insurance Company, Stonewall Insurance Company, Tenecom Insurance Company, Winterthur Swiss Insurance Company, and International Insurance Company. The following parties appeared as *amici* in support of Petitioner before the California Supreme Court: the Commercial Law and Bankruptcy Section of the Los Angeles County Bar Association; United Policyholders; Celotex Asbestos Settlement Trust; Plibrico 524(g) Asbestos Trust; Babcock & Wilcox Company Asbestos Personal Injury Settlement Trust; and the Consumer Federation of America. The Complex Insurance Claims Litigation Association appeared as an *amicus* supporting Respondents in the California Court of Appeal.

STATEMENT PURSUANT TO RULE 29.6

Petitioner has no parent corporation and no publicly held company owns 10 percent or more of its stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Fuller-Austin Insulation Company, f/b/o the Fuller-Austin Asbestos Settlement Trust, respectfully petitions for a writ of certiorari to review the judgment of the California Court of Appeal, Second Appellate District, Division Two, as modified on February 17, 2006.

OPINION BELOW

The opinion of the California Court of Appeal is reported at 38 Cal. Rptr. 3d 716, and is reprinted in the Appendix ("App.") at 1a. The Order modifying the California Court of Appeal's opinion and denying Petitioner's Petition for rehearing is reported at 2006 Cal. App. LEXIS 211, and is reprinted at App. 262a. The California Supreme Court's denial of a petition for review is reported at 2006 Cal. LEXIS 4783, and is reprinted at App. 264a.

JURISDICTION

The judgment of the California Court of Appeal was entered on January 19, 2006, 1a, and rehearing was denied by that court on February 17, 2006, App. 262a. The California Supreme Court denied the petition for review on April 19, 2006. App. 264a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

STATUTORY PROVISION INVOLVED

Section 524 of the Bankruptcy Code, 11 U.S.C. § 524, is reprinted at App. 265a.

STATEMENT

1. An asbestos litigation crisis has long afflicted the Nation, its courts, and legions of deserving claimants. In 1991, a report commissioned by the Judicial Conference concluded that the problems created by what this Court has called "the elephantine mass of asbestos cases," cried out for "'federal legislation creating a national asbestos dispute-resolution scheme.'" *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 & n.1 (1999) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 598 (1997) (citing *Report of the Judicial Conference's Ad Hoc Committee on Asbestos Litigation* 3, 27-35)). While Congress has yet to enact a comprehensive solution to the entire asbestos litigation crisis, it has responded in part to this call with legislation addressing the massive number of claims against bankrupt defendants. *See Ortiz*, 527 U.S. at 860 n.34.

2. Enacted by Congress as part of the Bankruptcy Reform Act of 1994, Section 524(g) of the Bankruptcy Code established a mechanism to maximize the recovery of both present and future asbestos victims, while at the same time protecting otherwise viable companies from crippling asbestos liability. *See* 11 U.S.C. § 524(g), App. 269a. The statute authorizes all asbestos personal injury claims (both present and future) against the debtor to be channeled to a trust created as part of the bankruptcy plan and statutorily enjoins claimants from proceeding against the debtor. The trust is funded by assets contributed by the

debtor, often (as in this case) including the right to recover under the debtor's liability insurance policies.

Section 524(g) is specific and unique to asbestos bankruptcies in that it addresses asbestos personal injury claims arising *after* the bankruptcy filing; traditional bankruptcies address only those claims that exist as of the date on which the bankruptcy petition is filed. *See* App. 19a (citing *Free-Fall to Free-For-All: The Rise of Pre-Packaged Asbestos Bankruptcies* (Winter 2004) 12 AM. BANKR. INST. L. REV. 441, 444). Thus, in asbestos bankruptcies subject to Section 524(g), the creditor body includes not only claimants with existing asbestos-related personal injuries, but also persons previously exposed to asbestos who have not yet manifested or identified injuries so as to bring resulting claims. App. 19a.

The challenge of providing protection for future asbestos claimants is a daunting one given the sheer number of claims arising from asbestos exposure and the protracted period over which asbestos-related injuries may be manifested. And that challenge is compounded by problems of insolvency; asbestos liability has forced many defendants into bankruptcy and has threatened exhaustion of their assets, including insurance coverage, well before the torrent of asbestos injury claims has run its course. *See* STEPHEN J. CARROLL, ET AL., RAND INSTITUTE FOR CIVIL JUSTICE, ASBESTOS LITIGATION COSTS AND COMPENSATION: AN INTERIM REPORT vi-vii, 67-68 (2002); Brittain & Hillyer, *Maximizing Insurance Coverage in the Wake of Ohio's Asbestos Tort Reform*, 19-22 MEALEY'S LITIG. REP. ASB. 27 (Dec. 15, 2004).

If asbestos claims are paid at full value when presented, the limited funds available from the bankrupt

defendant's assets will inevitably be exhausted long before many future claimants even begin to suffer from their injuries. *Cf. Ortiz*, 527 U.S. at 856 (noting conflict between present and future claimants); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626 (1997) (same).

These are the policy considerations that drove Congress to require that asbestos trusts created under Section 524(g) must be "fair and equitable with respect to the persons that might *subsequently assert* [asbestos claims], in light of the benefits provided, or to be provided" to present claimants. 11 U.S.C. § 524(g)(4)(B)(ii), App. 274a-275a (emphasis added). Because this Court held in *Ortiz* and *Amchem* that class actions cannot properly bind future asbestos claimants, Section 524 presently serves as the lone means of providing for recovery by future claimants by protecting the bankrupt company's assets against exhaustion by present claimants.

Under Section 524(g), upon confirmation of the asbestos defendant's bankruptcy plan, the bankruptcy court issues a "channeling injunction" directing asbestos claimants holding both pre-petition claims and potential future claims to bring their claims against the trust established by the debtor, rather than against the debtor itself. App. 20a. Such a trust is funded in whole or in part by the assets of the debtor involved in the confirmed plan (typically including insurance coverage that may constitute a large portion of a trust's total assets). *See* 11 U.S.C. § 524(g)(2)(B)(i)(II), App. 270a. Congress viewed the trust and channeling injunction as a means of preserving assets for equitable distribution to present *and future* claimants; the only alternative would be complete liquidation of the debtor and premature exhaustion of all of its assets to satisfy present claims:

> The Committee remains concerned that full consideration be accorded to the interests of future claimants who, by definition, do not have their own voice. Nevertheless, the Committee also recognizes that the interests of future claimants are ill-served if Johns-Manville and other asbestos companies are forced into liquidation and lose their ability to generate stock value and profits that can be used to satisfy claims . . . .
>
> . . . .
>
> In order for future claimants to be bound by a trust/injunction, section [524(g)] requires that the trust operate in a structure and manner necessary to give reasonable assurance that the trust will value, and be able to pay, similar present and future claims in substantially the same manner.

H.R. REP. NO. 103-835, at 41 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3340, 3349-50, App. 291a-292a; *see also* 11 U.S.C. § 524(g)(2)(B)(ii)(V), App. 271a.

Congress' solicitude for future claimants accorded with this Court's exclusion of those claimants in plaintiff classes that stood to be bound by settlements in *Ortiz* and *Amchem*. In those cases, the Court acknowledged a potential conflict of interest between present and future claimants: "'[F]or the currently injured, the critical goal is generous immediate payments,' but 'that goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future'" *Ortiz* 527 U.S. at 856 (quoting *Amchem*, 521 U.S. at 626). Congress has specifically addressed this tension, prescribing that a Section 524(g) trust must take due account of future claims by prudently limiting present payouts in order to

maintain sufficient funds to pay "similar present and future claims in substantially the same manner." H.R. REP. NO. 103-835, at 41, *reprinted in* 1994 U.S.C.C.A.N. at 3350, App. 293a.

Congress consciously modeled its Section 524(g) solution upon trusts created in the Johns-Manville and UNR bankruptcies, which Congress praised as a "creative solution to help protect the future asbestos claimants." H.R. REP. NO. 103-835, at 40, *reprinted in* 1994 U.S.C.C.A.N. at 3348-49, App. 290a. Both Johns-Manville and UNR, like many other asbestos defendants, had faced steep liabilities that had plunged them into bankruptcy and raised the specter that future claimants might be deprived of any recovery.[1] Thus, the purpose of Section 524(g) was "to offer similar certitude to other asbestos trust/injunction mechanisms that meet the same kind of high standards with respect to regard for the rights of claimants, present and future, as displayed in the two pioneering cases." H.R. REP. NO. 103-835, at 41, *reprinted in* 1994 U.S.C.C.A.N. at 3349, App. 292a.

Congress found that future claimants could be protected by creating a trust drawing upon "stock of the emerging debtor company . . . along with contributions from . . . insurers." H.R. REP. NO. 103-835, at 40, *reprinted in* 1994 U.S.C.C.A.N. at 3349, App. 290a-291a. Indeed, the

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[1] In 1982, for example, Johns-Manville faced 12,500 current asbestos claims, along with 50,000-100,000 future claims entailing potential liability of $2 billion. H.R. REP. NO. 103-835, at 40, *reprinted in* 1994 U.S.C.C.A.N. at 3348, App. 290a. Similarly, in 1982, UNR faced over 100,000 pending claims, and its asbestos liabilities were calculated at $254 million. *UNR Indus. Inc. v. Continental Cas. Co.*, 942 F.2d 1101, 1005 (7th Cir. 1991).

availability to the trust of the proceeds of the debtor's insurance policies was central to the viability of the UNR and Johns-Manville asbestos trusts – and of the Section 524(g) trust mechanism that they inspired. UNR's effort to obtain these proceeds is particularly instructive here, illustrating the folly and danger of the decision below. The district court in *UNR* had initially held that the asbestos trust could enforce the insurer's obligations only by "proving the amount that specific asbestos victims actually receive on their claims." *UNR Indus., Inc. v. Continental Cas. Co.*, 942 F.2d 1101, 1104 (7th Cir. 1991). The Seventh Circuit reversed, holding that the district court's ruling "fails to take adequate account of the effects of UNR's bankruptcy, [which] may confer a windfall on [the insurer] at the expense of the asbestos victims." *Id.* Although the UNR Trust paid "only a portion of the asbestos victims' actual damages in the bankruptcy proceedings," this merely "reflected the amount of UNR's assets that the asbestos victims could reach" – *not* the merits of the claim or the underlying liability. *Id.* at 1105. Accordingly, the Seventh Circuit held that the insurers must pay the full amount of the debtor's liability to the asbestos victims (subject to the policy limits), not the limited amount actually paid by virtue of the debtor's insolvency.

Here, the California Court of Appeals has taken precisely the opposite approach, as we explain below. Its decision effectively kicks the insurance legs out from under Section 524(g) asbestos trusts and thus threatens the entire statutory regime.

3. From the mid-1940s to the mid-1980s, Fuller-Austin was involved in the installation and removal of building materials containing asbestos. App. 4a. Fuller-Austin ceased active operations in 1987, and it began

receiving asbestos personal injury claims during the same time period. App. 4a-6a. By the early 1990s, the number of claims had begun to soar. App. 6a. A number of Fuller-Austin's excess liability insurers contested coverage on these claims, and Fuller-Austin commenced this action in California state court ("Coverage Litigation") in November 1994 against a number of its insurers. App. 6a.

Meanwhile, with its asbestos liabilities mounting, Fuller-Austin filed for Chapter 11 bankruptcy protection on September 4, 1998. In the Bankruptcy Court, Fuller-Austin and an overwhelming majority of its asbestos creditors sought confirmation of a plan prepared in accordance with Section 524(g). App. 8a. The plan established a Section 524(g) trust (hereinafter, "Trust") to assume all of Fuller-Austin's present and future asbestos liabilities. App. 8a-9a. Modeled specifically after the UNR and Johns-Manville trusts, the Trust would receive assets consisting of cash, the stock of the reorganized company, and the proceeds of Fuller-Austin's insurance policies. App. 9a. The plan also required the creation of claims resolution procedures setting forth the criteria by which claims by asbestos victims would be evaluated and paid by the Trust. App. 9a. In general, if a claimant satisfied the criteria, then his or her claim would be "allowed," and assigned a predetermined "allowed liquidated value" ("ALV") pegged to one of five asbestos-related disease categories. App. 9a. "An Allowed Asbestos Claim shall be, and be deemed to be, a judgment against Fuller-Austin and the Trust (as successor for all purposes to the liabilities of Fuller-Austin in respect of Asbestos Claims) in the Allowed Amount of such Allowed Asbestos Claim." Order Approving the Disclosure Statement and Confirming the Plan of Reorganization for Fuller-Austin Installation Company at 11, *In re Fuller-Austin Installation Co.*, No. 98-2038 (Bankr. D. Del. Nov. 13, 1998).

Consistent with Section 524(g), however, a present claimant would not be paid the claim's *full* ALV by the Trust. Instead, the trustees were required to take due account of the anticipated, and potentially competing, entitlements of future claimants. Specifically, the plan expressly provided that a claimant would receive only a periodically adjusted "Payment Sum Percentage" ("PSP") of the ALV, which would be determined based upon the Trust's available assets and its expectation of future claims. App. 9a. By paying only a percentage of the ALV as calculated under the PSP, the Trust would treat present and future claimants alike and husband its total assets for the sake of all claimants, rather than just present claimants. 11 U.S.C. § 524(g)(2)(B)(i), App. 269a. The PSP mechanism was modeled after the one employed in UNR, and now used in all Section 524(g) trusts. *Cf.* App. 326a ("Bankruptcy law requires that the members of each class of claimants be treated equivalently. If there is not sufficient money to pay full value for all of the claims in a class, then all class claimants must be paid the same percentage of full value in accordance with available funds. . . .").

The current Fuller-Austin claimants fully understood and agreed that they stood to receive from the Trust periodic payments totaling less than the full ALV, as calculated under the PSP. This did *not* reflect a lack of merit in their claims. Rather, it simply reflected the necessary practical compromise struck by Congress in Section 524(g) to equitably accommodate the claims of both present and future claimants.

4. Fuller-Austin's excess insurers objected to confirmation of the bankruptcy plan. The bankruptcy court held that the insurers lacked standing to appear in the bankruptcy proceeding because they were not "directly and

pecuniarily affected" by the proposed plan, and their rights under the insurance policies were preserved for adjudication in this case – the Coverage Litigation. App. 12a (quotation marks omitted).[2] Fuller-Austin's bankruptcy plan was confirmed on November 13, 1998, including its projected liability for claims in the aggregate, and its fixed schedule for calculating the ALV of individual claims. App. 12a. The insurers did not appeal the standing ruling, or the confirmation order, nor did they seek an order modifying the confirmed plan. The plan became effective December 11, 1998; the stock of Fuller-Austin was transferred to the Trust, which then became responsible for paying Fuller-Austin's asbestos liabilities and recovering Fuller-Austin's liability insurance to meet them. Accordingly, the Trust assumed control of this case – the Coverage Litigation seeking to recover, on behalf of the Trust beneficiaries, the amounts owed under Fuller-Austin's insurance policies. App. 12a, 212a-213a.

5. In this case, the state trial court held that "'Fuller-Austin's confirmed bankruptcy plan is a binding federal court judgment and adjudication that establishes Fuller-Austin's liability and its legal obligations to pay

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[2] Although the California trial court subsequently ruled in the Coverage Litigation that the Bankruptcy Court's confirmation of the bankruptcy plan was a final adjudication that in fact had conclusively fixed the insurers' obligations, that is not the posture in which the case now comes before this Court. Instead, the Court of Appeal below reversed on this point, ruling that (i) the bankruptcy plan was, consistent with the Bankruptcy Court's account, the result simply of a settlement and not of an actual trial or Bankruptcy Court adjudication, and (ii) the insurers' voluntary failure to participate in the settlement negotiations resulting in the bankruptcy plan meant that it was at least presumptively binding upon them. The court therefore remanded so that the insurers could pursue any argument to the effect that the settlement was unfair, unreasonable, or the product of fraud or collusion. *See* App. 45a.

damages to all pending and future asbestos claimants.'" App. 13a (quoting trial court). It also held that the bankruptcy proceedings constituted an "actual trial" of Fuller-Austin's liability, and that, alternatively, the Plan constituted a "settlement" for which the insurers' consent was unnecessary because the insurers "had received notice of and an opportunity to participate in the bankruptcy proceedings." App. 13a.

The trial court then conducted a jury trial to determine the total amounts owed by the insurers to the Trust for Fuller-Austin's present and future asbestos liabilities, and to allocate those obligations among the individual insurers. App. 15a. The trial court instructed the jury that the amounts owed by the insurers must be based upon the full ALV for which the Trust was liable, irrespective of whether or how that might be discounted via the PSP. The jury found that the value of claims already allowed by the Trust was $108.175 million, the value of pending but unresolved asbestos claims was $108 million, and the value of future claims was $750 million. The trial court apportioned the jury's award among the insurers and entered judgment on August 1, 2003.

The California Court of Appeal affirmed in part and reversed in part. Critical for present purposes was the Court of Appeal's holding that the insurers were liable not for the full ALV entitlement of claimants, but rather only for the discounted PSP amount the Trust actually pays to claimants in accordance with the mandate of Section 524(g). In other words, the court below held that the discount (per the PSP) on the ALV otherwise due and owing to a particular claimant reduced the insurer's obligations by that same amount. The discount required by Section 524(g) on payments to present claimants to

enable the Trust to make like payments to similar future claimants was, in effect, taken from those future claimants and awarded to the insurers. The decision below thus gives rise to the very "windfall" to insurers that the Seventh Circuit had eschewed in *UNR*, 942 F.2d at 1105.

Although the Court of Appeal acknowledged that the trial court's contrary judgment "comports with the goals of 11 U.S.C. section 524(g) to ensure that all asbestos claimants are treated fairly and – to the extent possible – equally," the court nonetheless concluded that Congress's purpose could not be reconciled with "the parties' contractual rights and obligations under their insurance polices." App. 4a. The California Court of Appeal expressly opted *against* "the strong public policy to compensate victims of asbestos exposure" in deference to what it characterized as the "express[] and unambiguous[]" specification of the bankruptcy plan that the "Trust's obligations [may] be satisfied by payment" of the PSP – which, when read alongside the insurance contracts, meant that the insurers' obligations were limited to that discounted amount. App. 56a, 58a.

The court explicitly "declined to follow" the contrary holding of the Seventh Circuit in *UNR Industries*:

> Implicit in the *UNR Industries* court's reasoning is the notion that there is a direct relationship between the amount that [the insurer] pays into the trust and the amount that each asbestos victim will receive. [But] here the Plan makes no provision for such a relationship. In other words, nothing in the Plan states that the payment sum percentage received by each asbestos claimant is directly affected by the level at which insurance proceeds are recovered. While

> certainly there may be some indirect effect to the extent that the payment sum percentage can change on the basis of [the] total Trust's assets, such a tenuous relationship affords no basis for imposing an indemnification obligation on appellants in the ALV amount. *We therefore decline to follow UNR Industries on this point.* Appellants are not required to indemnify Fuller-Austin in the ALV amount of each claim; their obligation is to indemnify Fuller-Austin for the amount the Plan obligates it to pay for each allowed claim.

App. 59a-60a (emphasis added).

The court rested its ruling in large measure upon the notion, demonstrably false both in fact and as a matter of law, that asbestos claimants would not benefit from "an order requiring [the insurers] to indemnify Fuller-Austin in the ALV amount of each claim, as such payment would not alter the Plan's payment provisions dictating that each claimant receives only a payment sum percentage of the ALV." App. 57a. The court suggested that increased Trust assets provided by additional insurance proceeds might instead be "used . . . for trust expenses and charitable purposes." App. 57a. As detailed below, however, the CRP permits the Trustees to use Trust assets for charitable purposes only *after* all asbestos claims have been paid *in full* – a theoretical possibility that has little real-world significance here in any event. Nor is there any factual or legal basis for the facially absurd notion that recovery of additional insurance proceeds by the Trust will somehow be accompanied by an increase in trust expenses that entirely consumes the additional assets.

In sum, the supposed distinctions offered by the Court of Appeal to justify departing from the Seventh Circuit's

decision in *UNR Industries* were no distinctions at all. In limiting the insurers' obligations, the California Court of Appeal pointed to characteristics of the Trust here that are in fact identical to those of the very trusts upon which Congress modeled Section 524(g). If the decision below is allowed to stand, an important component of the statutory regime crafted by Congress to relieve the asbestos litigation crisis will be undone.

6. Petitioner sought review from the California Supreme Court, but that court denied review. App. 264a.

REASONS FOR GRANTING THE PETITION

Though the decision below is, to be sure, interlocutory, its undermining of both Section 524(g) and the availability of insurance coverage as part of an asbestos trust's assets is not. In remanding for a determination of coverage obligations, the decision below finally resolved the question as to the *amount* of the insurers' coverage obligations, limiting it to the Trust's PSP payments, rather than claimants' ALV entitlements. Given the agreed-upon exigency of the asbestos litigation crisis and the acknowledged threat the decision below poses to Congress' statutory prescription for ameliorating it, review by this Court is appropriate, and necessary, at this time.

THE RULING BELOW UNDERMINES CONGRESS' POLICY FOR ADDRESSING THE ASBESTOS LITIGATION CRISIS BY PENALIZING COMPLIANCE WITH SECTION 524(g).

A. The State Court's Rule Limiting An Insurer's Liability To A Section 524(g) Bankruptcy Trust Discriminates Against Such Trusts And Subverts Congress' National Asbestos Litigation Policies.

It is a familiar and fundamental principle of federal bankruptcy law, codified and reflected in 11 U.S.C. § 524(e), App. 268a, that "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other debtor for, such debt." Thus, a bankruptcy discharge by no means reaches the insurers of a bankrupt entity, whose coverage obligations remain intact. *See, e.g., Houston v. Edgeworth*, 993 F.2d 51, 53-54 (5th Cir. 1993) ("11 U.S.C. § 524(e) excludes the liability insurance carrier from the protection of bankruptcy discharge"); *Chapman v. Bituminous Ins. Co.*, 345 F.3d 338, 343 (5th Cir. 2003); *In re Shondel*, 950 F.2d 1301, 1308 (7th Cir. 1991); *In re Jet Florida Sys., Inc.*, 883 F.2d 970, 975 (11th Cir. 1989); *In re Beeney*, 142 B.R. 360, 363 (B.A.P. 9th Cir. 1992).

But the rule adopted below is to the contrary. Under it, insurers of a bankrupt asbestos defendant automatically receive a discount of their own liability as a result of the trust's obligation to comply with Section 524(g). That provision requires trusts to discount payments to present claimants in order to ensure that equally deserving future claimants receive a like recovery for their injuries. In a very real sense, Section 524(g) takes part of present-claimant Peter's recovery to ensure that there is money in the till to pay future-claimant Paul. The Court of Appeal's ruling effectively transfers that discount to insurers by

limiting their obligation to the amount actually paid rather than the full amount owed by the bankrupt debtor to the asbestos claimants. The Court of Appeal squarely held that liability insurance companies "are not required to indemnify Fuller-Austin in the ALV amount of each claim; their obligation is to indemnify Fuller-Austin for the amount the Plan obligates it to pay for each allowed claim." App. 60a. Thus, the ruling below penalizes asbestos trusts for compliance with Section 524(g), and confers a corresponding windfall upon insurers, who wind up liable for less than they would otherwise owe asbestos victims based upon their underlying liability, in contravention of Section 524(e).

It is undisputed that the insurance companies must "indemnify Fuller-Austin for amounts it is 'obligated to pay' by law." App. 55a (quoting the liability policies); *see also* App. 45a-47a. The ALV – the allowed liquidated value – is the amount that each claimant agreed to accept as fixing Fuller-Austin's liability to the claimant, in consideration for releasing the claimant's personal injury claim. The Court of Appeal itself observed that the insurance companies "do not dispute that Fuller-Austin's bankruptcy reorganization constituted a settlement." App. 32a. The Court of Appeal likewise affirmed the trial court's ruling that the insurance companies "were afforded a reasonable opportunity to participate in the settlement negotiations," but chose not to do so. App. 42a. Although the insurers are entitled on remand to litigate "whether, as to them, the bankruptcy Plan is unfair, unreasonable or the product of fraud or collusion," App. 45a, the court below held that this does not disturb the finality of the ruling on the "reasonableness [of] the ALV amounts." App. 68a. To the contrary, those amounts are "'reasonable, were negotiated

in good faith among the parties to the bankruptcy, and constitute a *binding liability of Fuller-Austin to the asbestos claimants.*'" App. 67a (quoting the jury instructions) (emphasis added).

That payouts on claims from the Trust's limited assets have been legislatively balanced between present and future claimants under Section 524(g) has no bearing upon the debtor's underlying liability, and certainly cannot be used to the collective detriment of claimants as a whole by discounting the insurance coverage otherwise available for their benefit. The statutory mandate to preserve assets for future claimants under Section 524(g) requires that current claimants forego pursuing their own direct rights against the debtor's insurers and receiving the full amount otherwise owed – the ALV amounts at which they settled and released their claims – in order to establish a reserve enabling the Trust (i) to compensate future claimants, (ii) to pursue insurance litigation and take other steps to marshal its assets, and (iii) to pay the costs of its own operations.[3]

Section 524(g) has thus become, in the hands of the California Court of Appeal, a device for diverting available

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[3] This is confirmed by both the bankruptcy disclosure statement and the Plan that were sent to claimants in 1998. The holders of asbestos claims were "deemed to have assigned to the Trust, and the Trust [was] deemed such holder's sole attorney in fact" to resolve, the asbestos claims, App. 307a; App. 310a; App. 312a, with the express understanding that "the Trust will not be able to pay in full all Asbestos Claims as they are liquidated and will not be able to pay all Asbestos Claims in full over time," App. 302a, because "[t]he Trust is designed to protect those who are not presently injured but may develop an asbestos-related cancer or other asbestos-related injury in the future by retaining sufficient funds in the Trust." App. 300a.

assets away from asbestos trusts and back to insurers, to the immediate detriment of the asbestos victims whose interests Congress sought to serve. Contrary to Section 524(e), the ruling below effectively discharges insurers from a portion of their insurance obligation when the debtor-insured is an asbestos defendant that has filed for bankruptcy and sought resolution of asbestos liability under Section 524(g).

B. The Ruling Below Will Undermine Section 524(g) Trusts That Are Dependent Upon Insurance Assets.

Under the ruling below, the assets and operations of insurance-dependent Section 524(g) trusts will be crippled. Because the trust's initial payouts to present claimants must be discounted, in accordance with Section 524(g), insurers' coverage obligations, according to the decision below, must be correspondingly reduced. At that point, the trust would commence a regressive spiral, adjusting anew for a diminishment in assets relative to its initial projections, effectively resulting in *still further discounts* in payments to present claimants to preserve (shrunken) assets for future claimants, which reduces insurers' obligations further still. So the cycle would continue, with payment discounts pushing insurers' obligations further and further downward, which in turn push PSP payouts further and further downward. That is largely the situation in which the Fuller-Austin Trust now finds itself. And it is, of course, precisely the opposite of what Congress intended.

The Court of Appeal's decision is especially problematic for trusts whose primary asset is insurance because, if the trust only receives that which it must pay to claimants

immediately (the PSP), then the trust will have no assets available to cover its costs of administration and litigation. In other words, by finding that the Trust is only entitled up front to the PSP rather than the ALV, the decision below creates a liquidity crisis almost from the inception of a trust that relies heavily upon insurance. Without the resources necessary to recover and pursue insurance proceeds immediately, the ability of any such Section 524(g) trust to function going forward may be severely compromised. The difference between the PSP and the ALV creates, in effect, a reserve that enables the Trust to compensate future victims, as well as pursue claims against insurers and otherwise maximize Trust assets.

C. The State Court's Decision Is Contrary To Federal Authority.

The Court of Appeal expressly refused to follow pertinent federal authority on the effect of asbestos bankruptcy trusts on insurance obligations. In *UNR Industries, Inc. v. Continental Casualty Co.*, 942 F.2d 1101 (7th Cir. 1991), the Seventh Circuit reversed a trial court decision adopting the rule embraced by the court below in this case. The lower court, like the court below in this case, had required the bankrupt asbestos defendant's insurers to pay the bankruptcy trust *only* the "amounts specific victims actually received," but the Seventh Circuit held that this result "fail[ed] to take adequate account of the effects of UNR's bankruptcy." 942 F.2d at 1104. The court explained that a rule limiting insurers' obligations to the amounts actually paid to asbestos trust beneficiaries (rather than the allowed liability value)

> threatens to confer a windfall on [the insurer] at the asbestos victims' expense.

> The reason for the potential windfall is that UNR [the asbestos debtor] paid the Trust only a portion of the asbestos victims' actual damages in the bankruptcy proceedings. This discounting of the asbestos victims' damages had nothing to do with the merits of their claims. The discounting merely reflected the amount of UNR's assets that the asbestos victims could reach. [The insurer] may profit greatly from UNR's bankruptcy if its obligations are based on the arbitrarily discounted amount that the asbestos victims actually receive from the Trust.

Id. at 1105.

The California Court of Appeal expressly "decline[d] to follow *UNR Industries* on this point." App. 60a. The only grounds offered by the court below to distinguish *UNR* misapprehend the procedures of both the UNR and Fuller-Austin trusts. *See* App. 57a-60a. According to the Court of Appeal, "[i]mplicit in the *UNR Industries* court's reasoning is the notion that there is a direct relationship between the amount [the insurer] pays into the trust and the amount that each asbestos victim will receive." App. 59a. This is true, of course, but it does not distinguish the Trust here from the UNR trust. The present claimants in UNR, like those here, were subject to a discount of some of the value of their claims in order to ensure availability of funds for future claimants. *See* App. 330a.

The court below also misapprehended the operation of the Fuller-Austin Trust. The Court of Appeal stated that, "nothing in the Plan states that the payment sum percentage received by each asbestos claimant is directly affected by the level at which insurance proceeds are recovered." App. 59a-60a. Specifically, the court suggested

that "there is no assurance in the Plan – and no requirement in the [claims resolution procedures] – that the Trustees would upwardly adjust the payment sum percentage on the basis of the Trust's increased assets provided by the insurance proceeds. Rather, the plan expressly allows excess Trust assets to be used both for trust expenses and charitable purposes." App. 57a. The Trust documents themselves belie this conclusion, and it is noteworthy that the Court of Appeal fails to provide a citation to those documents, let alone a quotation from them, to substantiate its assertions.

First, the Trust exists solely to pay asbestos claims: "The purpose of the Trust shall be to . . . direct the liquidation, resolution, payment and satisfaction of all Asbestos Claims . . . [and to] preserve, hold, manage, and maximize the Trust Assets for use in paying and satisfying Allowed Asbestos Claims." App. 312a. This is mandated by statute. *See* 11 U.S.C. § 524(g)(2)(B)(i)(I) and (IV), App. 269a-270a. The Trustees, of course, have a fiduciary duty to maximize the payment of asbestos claims. *See, e.g.*, BOGERT ON TRUSTS §§ 95, 97, at 341, 352 (6th ed. 1987). And the Plan expressly authorizes increases in victim payments if more assets become available to the Fuller-Austin Trust: "[T]he Trustees have the power to alter the Payment Sum Percentage . . . as well as the power to increase the Allowed Liquidated Value for any Asbestos-Related Disease Category." App. 332a. It could hardly be otherwise, given that the assets of the Fuller-Austin Trust are beneficially owned by the asbestos victims; they hold equitable title to the assets. *See* RESTATEMENT (THIRD) OF TRUSTS § 2 cmt. d (2001); BOGERT ON TRUSTS § 166, at 609. Therefore, more assets for the trust means more money for asbestos claimants.

Second, contrary to the ruling below, there is no risk that the Trustees will divert asbestos victims' money to "charitable purposes." *See* App. 57a. The Plan provides that "Excess Trust Assets" may be donated to charities involving "the treatment of, research regarding or payment of claims related to asbestos-caused disorders," *but only "[t]o the extent there are any Trust Assets remaining after the payment, in full, of all Allowed Asbestos Claims* and the payment, in full, of all Trust Expenses." App. 313a-314a (emphasis added). And given the undisputed fact that claims far exceed assets (the record reflects no more than $400 million in insurance assets, in comparison to the jury's finding of $966 million in liabilities), the trustees' authority to make such donations has no practical significance here in any event.

Third, the Court of Appeal's reliance on the possibility of diversion of trust assets to pay "trust expenses" does nothing to distinguish the Fuller-Austin Trust from any other asbestos trust – or, indeed, from any other trust of any kind. *All* trusts incur operational expenses in administering claims and in undertaking litigation to marshal trust assets, and the power of the trustees to pay such costs is necessarily provided for in trust documents – including the documents establishing both the UNR and the Fuller-Austin Trusts. *See* App. 314a; App. 337a. The exercise of such discretionary spending power by trustees poses no threat to the beneficiaries' interests because it is, of course, restricted by the trustees' fiduciary duty to the trust's beneficiaries. *See* BOGERT ON TRUSTS § 89, at 321; § 95, at 341-42; § 124, at 446. Most importantly, the notion that the recovery of additional insurance assets would generate additional expenses exceeding the recovery is absurd on its face.

The court below asserted that its refusal to follow *UNR* did not create a split of authority because the asbestos bankruptcy trust in that case predated the enactment of Section 524(g). App. 53a. But this overlooks the fact that Congress enacted Section 524(g) *to codify the UNR bankruptcy trust mechanism*. *See* H.R. REP. NO. 103-385, at 40, *reprinted in* 1994 U.S.C.C.A.N. at 3348, 3349, App. 290a-291a.

The decision of the court below to reject the Seventh Circuit's reasoning in *UNR* and to construe the insurers' policies and rights under state law without regard to Section 524(g) "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). The principle that such applications of state law are superseded by federal law carries at least as much weight in the field of bankruptcy as anywhere else. *Perez v. Campbell*, 402 U.S. 637, 650-51 (1971) (quoting *Hines*). One of the principal goals of the federal Bankruptcy Code is assuring an equitable distribution to a debtor's creditors, and applications of state law that obstruct that goal cannot stand. *See Sherwood Partners, Inc. v. Lycos, Inc.*, 394 F.3d 1198, 1203-04 (9th Cir. 2005) (voiding as preempted an exercise of preference-avoidance powers granted to an assignee by state law because of interference with federal goal of equitable distribution). The problem of equitable distribution is particularly acute with respect to bankrupt asbestos defendants, some of whom have (or will have) injured tens of thousands of present and future tort victims. It was for this reason that Congress enacted Section 524(g).

Again, the court below held that the Trust claims procedures, limiting payment of present claimants to the PSP rather than the ALV, relieved the insurers of the obligation to pay anything above the PSP. App. 54a-56a, 60a. Thus, the Trust is effectively being told that its wound is self-inflicted. But the terms of the Trust and the claims procedures are dictated by Section 524(g) – the only way to satisfy the congressional directive is to pay present claims, at least initially, at a discounted rate in order to preserve funds allowing future claimants to receive equivalent treatment. Therefore, the true trigger for the court's ruling (as it has largely acknowledged) is Section 524(g) and Congress, and the true thrust of that ruling is to stymie the operation of the statute and achievement of the congressional purpose.

The Court of Appeal, as noted previously, acknowledged the mischief its decision will work upon Congress' scheme for asbestos bankruptcies, even expressing regret at the result: "While we do not intend to undo the efficiencies afforded by 11 U.S.C. section 524(g), we cannot conclude that the statute was intended to eradicate appellants' rights under their insurance policies." App. 4a. But it matters not whether the state "intend[s] to undo" federal statutory policy – all that matters is that the state's application of its law does, in fact, frustrate federal law, which the Constitution renders supreme. *Perez*, 402 U.S. at 651-52 ("We can no longer adhere to the aberrational doctrine . . . that state law may frustrate the operation of federal law as long as the state . . . had some purpose in mind other than one of frustration.").

The Court of Appeal thus did not dispute its frustration of federal bankruptcy policy – it was simply unmoved by it. In fact, the court chastised the trial court for basing

its decision on what the Court of Appeal derided as mere "policy considerations." App. 56a. But the "policy considerations" so cavalierly dismissed by the court below are those established by Congress. They are those that this Court so powerfully – and, we submit, correctly – urged Congress to address in *Ortiz* and *Amchem*. Section 524(g) mandates equal treatment for present and future asbestos claimants, and expressly endorses a trust regime of "pro rata distributions" and subsequent "supplemental payments" to asbestos victims to achieve such treatment. 11 U.S.C. § 524(g)(2)(B)(ii)(V), App. 271a. If the ruling below stands, this salutary effort to divvy up what pie exists equitably for the benefit of present and future asbestos claimants alike will wind up shrinking that pie to the detriment of all concerned (apart from insurers), contrary to Congress' purpose and the interests of the true victims of this crisis.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

July 18, 2006

Respectfully submitted,

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APPENDIX

135 Cal.App. 4th 958

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

FULLER-AUSTIN INSULATION COMPANY, Plaintiff and Respondent, v. HIGHLANDS INSURANCE COMPANY et al., Defendants and Appellants.	B170079 (Los Angeles County Super. Ct. No. BC116835) (Filed Jan. 19, 2006)

APPEALS from a judgment of the Superior Court of Los Angeles County. Judith C. Chirlin, Judge. Affirmed in part and reversed in part and remanded.

Alschuler Grossman Stein & Kahan, Frank Kaplan, Kenneth S. Meyers; Spepanik Cortner McNaboe Colliau & Jordan and Michael T. Colliau for Defendants and Appellants Transcontinental Insurance Company and Columbia Casualty Company.

Hogan & Hartson, Kenneth D. Klein, David R. Singer, William J. Bowman (*pro hac vice*), James P. Ruggeri (*pro hac vice*), Catherine E. Stetson (*pro hac vice*); Wilmer

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of section IV.

Cutler Pickering Hale and Dorr, Seth P. Waxman (*pro hac vice*), Jonathan E. Nuechterlein (*pro hac vice*), Craig T. Goldblatt (*pro hac vice*) and Todd Zubler (*pro hac vice*) for Defendants and Appellants First State Insurance Company, New England Reinsurance Corp., and Twin City Fire Insurance Company.

Berkes Crane Robinson & Seal, Steven M. Crane, Barbara S. Hodous; Munger, Tolles & Olson, Ronald L. Olson, Kelly M. Klaus, Paul J. Watford, Sarah E. Kurtin and Grant A. Davis-Denny for Defendant and Appellant Stonewall Insurance Company.

Hancock Rothert & Bunshoft, Patrick A. Cathcart, William J. Baron; Wachtell, Lipton, Rosen & Katz, Michael W. Schwartz (*pro hac vice*), Douglas K. Mayer (*pro hac vice*), William Savitt (*pro hac vice*); Greines, Martin, Stein & Richland, Irving H. Greines, Robert A. Olson and Peter O. Israel for Defendants and Appellants Certain Underwriters at Lloyd's London and Certain London Market Insurance Companies.

Nancy F. Peters (*pro hac vice*); Thomas C. Sanford & Associates and Thomas C. Sanford for Defendants and Appellants Tenecom Insurance Company (f/k/a Yasuda Fire & Marine Insurance Company (UK) Ltd.) and Winterthur Swiss Insurance Company.

Sonnenschein Nath & Rosenthal and Ronald D. Kent for Defendant and Appellant International Insurance Company.

Morgan, Lewis & Bockius, Michel Y. Horton, Thomas M. Peterson, Jason B. Komorsky, Laura R. Ramos; Anderson Kill & Olick, Robert M. Horkovich (*pro hac vice*),

Rhonda D. Orin (*pro hac vice*) and Robert Y. Chung (*pro hac vice*) for Plaintiff and Respondent.

Wiley Rein & Fielding, Laura A. Foggan, Karalee C. Morell; Sinnott, Dito, Moura & Puebla and John J. Moura, Counsel for Amicus Curiae Complex Insurance Claims Litigation Association.

* * *

Appellants Certain Underwriters at Lloyd's, London and Certain London Market Insurance Companies (collectively LMI); Stonewall Insurance Company (Stonewall); Transcontinental Insurance Company and Columbia Casualty Company (collectively CNA); First State Insurance Company, New England Reinsurance Corp., and Twin City Fire Insurance Company (collectively First State); and International Insurance Company (International) appeal from a judgment entered in favor of respondent Fuller-Austin Insulation Company (Fuller-Austin) following a phased bench and jury trial.

This action raises the issue of the effect of an insured's bankruptcy under 11 U.S.C. section 524(g) on an excess insurer's obligations. Fuller-Austin utilized the unique provisions of that statute to resolve its liability for present and future asbestos claims. The trial court ruled that those bankruptcy proceedings not only conclusively determined Fuller-Austin's liability but also provided a mechanism for determining the aggregate value of that liability for the purposes of indemnification. Thereafter, a jury calculated and found appellants liable for a fixed sum that constituted the amount of Fuller-Austin's aggregate liability to present and future asbestos claimants.

Though the judgment comports with the goals of 11 U.S.C. section 524(g) to ensure that all asbestos claimants are treated fairly and – to the extent possible – equally, it is inconsistent with the parties' contractual rights and obligations under their insurance policies. Accordingly, significant portions of both the trial court's statement of decision and the special verdict must be reversed. The bankruptcy confirmation proceedings were not an actual trial of Fuller-Austin's liability triggering appellants' indemnification obligations. Moreover, estimations of the individual and aggregate value of present and future asbestos claims served neither to affix nor to accelerate appellants' indemnification obligations, and did not provide a basis for coverage of those claims to be presumed. Rather, the bankruptcy confirmation constituted a settlement of Fuller-Austin's liability, the effect of which was subject to challenge by appellants. While we do not intend to undo the efficiencies afforded by 11 U.S.C. section 524(g), we cannot conclude that the statute was intended to eradicate appellants' rights under their insurance policies.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Parties and the Insurance Policies.

From the mid-1940's to the mid-1980's, Fuller-Austin was involved in the installation and removal of building materials containing asbestos. In 1974, DynCorp acquired Fuller-Austin, which continued to operate as a subsidiary until it ceased operations in 1987.

Several insurance companies, including appellants, issued excess insurance policies to Fuller-Austin or DynCorp that covered periods during which Fuller-Austin was

in operation.[1] Five sets of policies are at issue in this appeal. LMI issued two categories of excess liability insurance comprised of five "London General" policies and four "Cities Service" policies covering the period from January 1966 to June 1971. Stonewall issued two excess policies covering the period from January 1973 to December 1975. CNA issued five excess or umbrella policies covering the periods from February 1977 to February 1978 and July 1981 to July 1985. First State issued three excess policies covering the period from February 1977 to February 1978 and July 1983 to July 1984. International issued one excess policy covering the period from July 1980 to July 1981.

The excess policies generally "follow form"; this means that they incorporate the provisions of the immediately underlying policies. Each of the excess policies incorporates substantially similar "loss payable provisions" that provide the excess insurer has no obligation to indemnify the insured until "after the Insured's liability shall have been fixed and rendered certain either by final judgment against the Insured after actual trial or by written agreement of the Insured, the claimant, and the Company." The excess policies allow but do not require appellants to defend Fuller-Austin against a claim. They similarly allow

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[1] An excess insurance policy serves a different purpose than a primary policy. Whereas primary coverage generally provides immediate coverage upon the occurrence of a loss or event giving rise to liability, "'[e]xcess insurance provides coverage after other identified insurance is no longer on the risk. "Excess" coverage means "coverage whereby, under the terms of the policy, liability attaches only after a predetermined amount of primary coverage has been exhausted.'" [Citation.]" (*Pacific Indemnity Co. v. Bellefonte Ins. Co.* (2000) 80 Cal.App.4th 1226, 1235, italics omitted.) We discuss only those excess policies issued by appellants.

but do not require appellants to participate in the investigation, settlement or defense of any claim.

B. Fuller-Austin's Coverage Action.

At about the same time that Fuller-Austin discontinued operations in the late 1980's, it began to face thousands of personal injury complaints filed by individuals claiming to have been injured by exposure to its asbestos materials. Fuller-Austin tendered those claims to its primary general liability insurers; they defended Fuller-Austin until it filed for bankruptcy in 1998.

In the early 1990's, the number of complaints began to escalate dramatically. In March 1993, Fuller-Austin sent letters to its excess insurance carriers stating: "The insurers who provided primary general liability coverage have agreed to defend the claims brought against DynCorp. At this point, we are providing you with notice of those underlying claims because it appears possible that excess general liability coverage may be implicated by these or future claims upon exhaustion of the primary limits." In response, Stonewall issued a reservation of rights letter indicating that it did not have enough information to determine whether there was coverage for the asserted losses and setting forth several possible bases under which coverage could be denied. Other insurers responded with letters requesting additional information.

In November 1994, Fuller-Austin filed the instant coverage action against approximately 20 excess insurers, seeking to establish coverage for past, present and future asbestos bodily injury claims under multiple general liability, excess and umbrella policies.

C. Fuller-Austin's Bankruptcy.

1. *Prebankruptcy negotiations.*

In 1997, while the coverage action was pending, DynCorp and Fuller-Austin began to explore the possibility of Fuller-Austin's filing for bankruptcy in accordance with 11 U.S.C. section 524(g) (section 524(g)). Enacted in 1994, section 524(g) addresses the unique bankruptcy-related problems that arise in the context of asbestos mass tort litigation. The statute provides a mechanism by which an entity can transfer its assets to a trust, which is then responsible for paying asbestos claimants over time. (See § 524(g)(2)(B).) This procedure is intended to enhance the likelihood that present and future claimants will be treated equally. Once a bankruptcy plan is confirmed under section 524(g), a permanent injunction is issued barring any further asbestos-related lawsuits against the debtor, and present and future claimants must seek compensation for their asbestos-related injuries from the trust alone. (See § 524(g)(1).)

On October 2, 1997, Fuller-Austin invited attorneys representing asbestos claimants to a meeting scheduled on October 21, 1997. The purpose of the meeting was to explore the possibility of filing a "prepackaged" bankruptcy plan, which would require Fuller-Austin and at least 75 percent of its creditors to reach agreement on the terms of a proposed bankruptcy plan before jointly seeking court approval.[2] (See section 524(g)(2)(B)(ii)(V).) On October 17, 1997, Fuller-Austin notified appellants of the meeting. The letter invited them to "participat[e] in this settlement process in an appropriate manner" subject to

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[2] Fuller-Austin's only creditors were asbestos claimants.

the execution of a confidentiality agreement, but expressly conditioned any involvement beyond participation: "Fuller's insurance companies have the option of directing Fuller not to engage in such negotiations or settlements, however, Fuller will accept such a direction only if accompanied by written binding commitments wherein all insurers accept tender of asbestos claim defense and asbestos claim indemnity without a reservation of rights." Representatives from two of the excess insurance companies attended the meeting.

Fuller-Austin and asbestos claimant representatives thereafter continued to negotiate, and in June 1998, they documented their agreement in the form of a bankruptcy plan (Plan) and disclosure statement. In August 1998, Fuller-Austin received approval of the Plan from 75 percent of the asbestos claimants. Though appellants knew about the negotiations, Fuller-Austin neither sought nor obtained approval of the Plan from appellants.

2. *Bankruptcy confirmation proceedings.*

On September 4, 1998, Fuller-Austin filed for Chapter 11 bankruptcy protection in the Delaware Federal District Court, seeking confirmation of the Plan prepared in accordance with section 524(g). In conjunction with the Plan, Fuller-Austin filed a disclosure statement setting forth the factual bases for the Plan. Appellants received the Plan and disclosure statement approximately two weeks after the filing.

The Plan provided for the creation of the Fuller-Austin Settlement Trust (the Trust) in accordance with section 524(g). The Trust assumed Fuller-Austin's liability for all present and future asbestos claims, and Fuller-Austin and

DynCorp received a full release and injunction barring any further litigation against them concerning present or future asbestos claims. In return, DynCorp contributed approximately $14 million in cash and other assets to the Trust, and Fuller-Austin contributed its insurance policies as well as its continued prosecution of this coverage action on behalf of the Trust.

The Plan created Claims Resolution Procedures (CRP) that set forth the procedural mechanisms by which the Trust would resolve claims alleging asbestos injuries. The CRP created no "substantive right for any claimant." According to the CRP, the Trust must determine whether to allow or disallow a claim at the time it is submitted. In general, the CRP provided that the Trust would allow a claim if the claimant demonstrated that he or she suffered from an asbestos-related illness or injury and had worked anywhere at a project site during or after Fuller-Austin's handling of asbestos-containing material at the site. If allowed, a claim would then be assigned a predetermined "allowed liquidated value" (ALV) corresponding to one of five asbestos-related disease categories. The claimant could either accept the Trust's determination or seek a different ruling through binding or nonbinding arbitration, or a jury trial. In view of the Trust's limited resources, however, the CRP expressly provided that a claimant would receive only a periodically adjusted "Payment Sum Percentage" of the ALV, based on the Trust's assets, that would amount to only a fraction of the ALV.

As originally proposed, the CRP also contained language mirroring the excess insurance policies' indemnification provisions. Specifically, the Plan required the bankruptcy court to determine an aggregate amount of Fuller-Austin's total asbestos liabilities to present and

future claimants, and provided that the Plan's confirmation would constitute "an adjudication of liability on the part of Fuller-Austin and the Trust for the Allowed Aggregate Asbestos Claim and to holders of Asbestos Claims, and shall be a determination of a sum that Fuller-Austin and the Trust shall be legally obligated to pay."

Asserting that this provision was an attempt to adjudicate the issues raised by the coverage litigation, appellants filed objections to the Plan and sought to intervene in the bankruptcy proceedings. As summarized by the bankruptcy court, appellants "object[ed] to the confirmation of the Plan and approval of the Disclosure Statement on the grounds that confirmation of the proposed Plan would 'summarily adjudicate the liability of excess carriers under excess insurance policies,' thus impacting and possibly influencing the resolution of the pending Coverage Litigation and impairing the rights and obligations of [appellants] under their insurance policies." Appellants also challenged the Plan's criteria for proof of exposure to asbestos and disease category valuations.

As a result of appellants' objections, Fuller-Austin unilaterally deleted the challenged language concerning any aggregate amount it would be legally obligated to pay and added a new provision that stated: "12.9.1 *Maintenance of the Coverage Litigation*. Notwithstanding any other provision in this Plan, all claims and defenses of any Asbestos Insurance Company that is a party to the Coverage Litigation shall be adjudicated in the Coverage Litigation, and all rights of the Asbestos Insurance Companies under the Asbestos Insurance Policies shall remain unaffected by the Plan and the Confirmation Order."

On October 15, 1998, the bankruptcy court held the confirmation hearing and heard argument concerning appellants' standing to intervene in the bankruptcy proceedings. First, the court proceeded with Fuller-Austin's presentation of evidence in support of the disclosure statement and the proposed Plan, allotting Fuller-Austin one hour with no cross-examination. Two witnesses testified – a law professor who helped prepare the prepackaged Plan on Fuller-Austin's behalf, and a valuation consultant who helped Fuller-Austin to estimate the number, cost and timing of future asbestos claims and to develop the CRP. Fuller-Austin also submitted eight affidavits from seven individuals (including the two who testified) who assisted in the negotiations and supported the Plan.

Second, the bankruptcy court heard argument concerning appellants' standing to intervene. In view of its modification to the Plan, Fuller-Austin represented: "Our view is that these carriers simply do not have any interest as affected by this plan of reorganization. The interests of the carriers in Fuller-Austin arise through a contract between Fuller-Austin and the carriers, a contract of insurance. What we have done, to make it clear, to the extent there is any doubt, is we have, in 12.9.1, said that all of their rights under those policies are unaffected by the plan of reorganization. [¶] Further, we all understand there is coverage litigation pending in California. We have tried to make clear, to the extent that that first proposition isn't sufficient, that these proceedings have absolutely no impact on the proceedings in California in terms of the claims and defenses that those carriers have raised and are litigating in California. [¶] . . . [¶] I think we have made perfectly clear in our amendment to the plan of reorganization that [the carriers'] rights are not affected,

and we have made perfectly clear in our amended plan that their claims and defenses in the coverage litigation is [*sic*] not affected."

On November 10, 1998, the bankruptcy court issued an order finding that appellants lacked standing to appear in the bankruptcy proceedings and overruling their objections to the Plan. It concluded that appellants were "not 'directly and pecuniarily affected' by the proposed Plan" because their rights under the insurance policies were preserved for adjudication in the coverage litigation. Thereafter, on November 13, 1998, the bankruptcy court issued findings of fact and conclusions of law, and confirmed the Plan. The confirmation order restated section 12.9.1 of the Plan, providing that appellants' rights under their policies were to remain unaffected by the Plan. The Plan became effective on December 11, 1998.

D. The Coverage Action Trial and Judgment.

Following Plan confirmation, Fuller-Austin resumed the coverage litigation.[3] In the operative fifth amended complaint, Fuller-Austin alleged claims for declaratory relief, breach of contract and bad faith. Claims against many insurers were resolved by way of motion or settlement. In 2000, the trial court bifurcated the trial against the remaining insurers into a Phase IA and IB bench trial and a Phase II jury trial.

In Phase IA, tried between December 4 and December 18, 2000, the trial court resolved two legal issues by way of

[3] "Fuller-Austin" generally refers to the Trust, which became the party prosecuting the coverage action.

a statement of decision issued on July 20, 2001. First, it determined that the excess policies generally "follow [] form," which means that they incorporate the terms and conditions of their underlying policies. Second, it found that horizontal rather than vertical exhaustion applied to determine the point at which an excess policy would be on the risk. The court concluded "that all of Fuller-Austin's applicable primary policies must be exhausted before any excess policy attaches." Appellants do not challenge either of the Phase IA rulings.

The trial court conducted the Phase IB bench trial between September and December 2001, and issued its initial statement of decision on February 26, 2002, and a revised statement of decision on August 6, 2002. In Phase IB, Fuller-Austin adopted a position it did not take in the bankruptcy proceedings; it asserted that its confirmed bankruptcy Plan was a final adjudication that established its liability to asbestos claimants and therefore obligated appellants to pay the full ALV established by the bankruptcy court with respect to each asbestos claim.

The trial court agreed with Fuller-Austin's new position, ruling that "Fuller-Austin's confirmed bankruptcy plan is a binding federal court judgment and adjudication that establishes Fuller-Austin's liability and its legal obligations to pay damages to all pending and future asbestos claimants." It found that the bankruptcy proceedings constituted an "actual trial" of Fuller-Austin's liability; alternatively, it reasoned that the Plan constituted a "settlement" for which appellants' consent was unnecessary because appellants had received notice of and an opportunity to participate in the bankruptcy proceedings. In connection with these findings, the trial court further ruled that appellants' "insuring obligations were

triggered by knowledge of asbestos liabilities potentially exceeding their attachment points and by Fuller-Austin's request that excess insurance companies participate in the handling and settling of the asbestos lawsuits," and that appellants "are obligated to pay the full allowed amount established by the federal court with respect to each asbestos claim, notwithstanding the fact that Fuller-Austin will only be able to pay a percentage of these values because of its bankrupt status." With respect to the issues remaining for Phase II, the trial court ruled that "[t]he asbestos liabilities adjudicated in the bankruptcy are presumed to be harm within coverage" and "[i]t is [appellants'] burden at trial to prove otherwise," and that "[t]he determination of the 'aggregate value' of Fuller-Austin's liabilities to pending and future asbestos claimants – i.e., the dollar amount of the bankruptcy court judgment against Fuller-Austin – will be determined in the jury phase of this case, based on expert testimony and statistical evidence, as is typical in assessing damages in contract or tort disputes."

With respect to the other legal issues adjudicated in Phase IB, the trial court adopted a continuous trigger of coverage, ruling that all policies in effect from the date of first asbestos exposure until the date of death or claim are triggered by an asbestos bodily injury claim. It further ruled that the excess insurers could not apportion any loss to an insolvent period at a lower coverage level; that the excess insurers were not required to drop down to respond to losses below their policies' stated attachment points; that the excess insurers' obligations to pay were triggered by Fuller-Austin's legal obligation to pay losses – not its actual payment thereof; and that insurance policies issued

by settled and dismissed insurance companies were deemed exhausted as a matter of law.

In September 2002, we summarily denied First State's petition for writ of mandate challenging the trial court's Phase IB rulings. (*First State Ins. Co. v. Superior Court* (Sept. 25, 2002, B160737).) Before commencement of the Phase II jury trial, appellants CNA, First State and International settled, reserving their right to appeal the two legal issues of whether they were obligated to provide coverage to Fuller-Austin on the basis of an estimation of the value of present asbestos claims and future demands, and whether they were obligated to indemnify Fuller-Austin for the ALV or the payment percentage received by each claimant.

Phase II began in February 2003 against LMI, Stonewall and Highlands Insurance Company (Highlands). The jury's task was to ascertain the scope of Fuller-Austin's present and future asbestos liabilities and to determine the obligations of the individual insurers with respect to those liabilities. The trial court instructed the jury on the basis of its Phase IB rulings. Significant instructions included that "[t]he confirmed bankruptcy plan established Fuller-Austin's liability for asbestos-related injuries, the amount of damages to which each asbestos victim is legally entitled, and the procedure for satisfying the liability"; "the asbestos bodily injury claims resolved in the bankruptcy proceedings are presumed to be harm within the coverage provided by the insurance policies issued by the insurance companies in this action"; the bankruptcy court determined that the damage amounts set forth in the Plan were reasonable; and "[e]ven if an excess insurance company has not denied coverage or refused to

defend, the insurance company has a duty to accept a reasonable settlement of covered claims. . . ."

In May 2003, the jury returned a 22-question special verdict, finding: With the exception of LMI under the Cities Service policies, no insurer breached its insurance policy before confirmation of the Plan; with the exception of Stonewall under one of its policies, all insurers breached their insurance policies after Plan confirmation, causing damage to Fuller-Austin; Fuller-Austin did not fail to cooperate with the insurers or to mitigate damages; the Plan was not the product of collusion or unclean hands; and the value of Fuller-Austin's allowed asbestos claims was $108,175,000, the value of pending but unresolved claims was $108 million and the value of future claims was $750 million. The jury allocated specific dollar amounts to both time periods and policies for present and future asbestos liability. The jury also resolved other issues specific to the Stonewall and LMI Cities Service policies.

After apportioning the jury's award among multiple insurance policies, the trial court entered judgment on August 1, 2003. It denied motions for a new trial and judgment notwithstanding the verdict on September 18, 2003. It also awarded certain costs to Fuller-Austin.

All appellants timely appealed from the judgment; Stonewall and LMI also appealed from the postjudgment orders.[4] Fuller-Austin filed a notice of cross-appeal from the judgment, but we dismissed its cross-appeal after it

[4] Highlands dismissed its appeal in September 2004.

failed to file an opening brief. We consolidated the matter for briefing and decision.

DISCUSSION

Appellants' claims may be classified into three general categories. First, appellants contend that the Phase IB rulings are legally insupportable. Specifically, they contend that the bankruptcy confirmation of the Plan did not trigger their indemnity obligations because it was neither an actual trial of Fuller-Austin's liability nor a settlement with their consent; that a jury's estimate of Fuller-Austin's present and future claims obligation cannot trigger their indemnity obligations because such an estimate is not an award of damages in a fixed amount; and that they cannot be required to indemnify Fuller-Austin in the amount of the ALV for each claim when – according to the Plan's own terms – Fuller-Austin will pay a lesser amount to each claimant. Second, they contend that the jury instructions erroneously and prejudicially imposed a presumption of coverage for present and future asbestos claims, and prevented the jury from determining whether the bankruptcy settlement was reasonable. Finally, appellants LMI and Stonewall contend that legal errors infected and substantial evidence did not support the verdict as it relates to certain specific policies they issued.

Resolution of the majority of these claims requires us to reconcile the provisions of section 524(g) with the language of the excess insurance policies. Our goal is to ensure that – to the extent reasonably possible – the parties have the same rights and duties that they possessed prior to bankruptcy. Because a debtor's property rights are determined by state law, bankruptcy provides

"no greater rights in property than those held by the debtor prior to bankruptcy." (*In re Coupon Clearing Service, Inc.* (9th Cir. 1997) 113 F.3d 1091, 1099; see also H.R. No. 595, 95th Cong., 1st Sess., reprinted in 1978 U.S. Code Cong. & Admin. News, at p. 5787 [bankruptcy "is not intended to expand the debtor's rights against others more than they exist at the commencement of the case"]; *In re Jones* (Bankr. E.D.Pa. 1995) 179 B.R. 450, 455 ["the owner of an insurance policy cannot obtain greater rights to the proceeds of that policy than he would have under state law by merely filing a bankruptcy petition"].) Just as bankruptcy does not enhance Fuller-Austin's rights, nor does it minimize appellants' obligations. (See Cal. Ins. Code, § 11580 [insurer is not relieved of its obligations because of insured's bankruptcy or insolvency]; *Haisten v. Grass Valley Medical Reimbursement* (9th Cir. 1986) 784 F.2d 1392, 1403 [Insurance code section 11580 is aimed at preventing an insurer from avoiding responsibility for its insured's conduct].)

Keeping these principles in mind, we turn first to provisions of section 524(g) and the courts' application of those provisions to insurers before we address appellants' specific claims.

I. Overview of Section 524(g) and Its Impact on Insurers.

Section 524(g) is a type of Chapter 11 bankruptcy. "In amending § 524(g) in 1994, Congress intended to address the unique situation faced by asbestos debtors and their creditors, specifically envisioning that the bankruptcy plan would set aside funds to provide for future claimants." (*In re G-I Holdings, Inc.* (Bankr. D.N.J. 2005) 323 B.R. 583,

620.) It is the compromise of future claims that makes section 524(g) unique: Section 524(g) "is a significant departure from typical bankruptcy cases, which compromise claims existing as of the date the bankruptcy petition is filed, but not claims that arise thereafter. [Fn.] In asbestos cases, the creditor body includes not only existing or present claimants, but also a significant number of future claimants: persons who were exposed to asbestos prior to a defendant's bankruptcy filing may not develop asbestos-related injuries until much later. Section 524(g) permits the debtor to protect itself against these 'future' claims. [¶] Section 524(g) is therefore significant because it is the mechanism by which an asbestos defendant may shield itself from liability by diverting not only present, but also future or unknown claimants, to a limited fund for payment." (*From Free-Fall to Free-For-All: The Rise of Pre-Packaged Asbestos Bankruptcies* (Winter 2004) 12 Am. Bankr. Inst. L.Rev. 441, 444 (*Asbestos Bankruptcies*).)

To qualify for the protection afforded by section 524(g), "a court must find that the debtor has been named in an action for damages allegedly caused by asbestos, that the debtor is likely to be subject to substantial demands for payment in the future arising out of the same or similar conduct, that the amounts and timing of such future claims are uncertain, and that permitting the pursuit of such claims outside the trust mechanism would threaten the plan's attempts to deal equitably with current and future demands. 11 U.S.C. § 524(g)(2)(B)(i)(I), (ii)(I-III)." (*In re Combustion Engineering, Inc.* (3d Cir. 2004) 391 F.3d 190, 234, fn. 45.) A debtor satisfying these criteria may propose a bankruptcy plan that provides for a trust to assume its liabilities for asbestos claims that is funded in whole or in part by the debtor's securities and obligation

to make future payments. (11 U.S.C. § 524(g)(2)(B)(i)(I)-(II).) To insure that both present and future asbestos claimants are treated alike, "the trust will operate through mechanisms such as structured, periodic, or supplemental payments, pro rata distributions, matrices, or periodic review of estimates of the numbers and values of present claims and future demands, or other comparable mechanisms, that provide reasonable assurance that the trust will value, and be in a financial position to pay, present claims and future demands that involve similar claims in substantially the same manner." (11 U.S.C. § 524(g)(2)(B)(ii)(V).)

To be confirmed, the section 524(g) plan must be approved by 75 percent of the claimants whose claims will be addressed by the trust. (11 U.S.C. § 524(g)(2)(B)(i)(IV)(bb).) If the plan is confirmed, the bankruptcy court issues a "channeling injunction" directing those holding prepetition claims to bring their claims against the trust established by the debtor, rather than against the debtor itself. (11 U.S.C. § 524(g)(2)(A); *In re Quigley Co., Inc.* (S.D.N.Y. 2005) 323 B.R. 70, 78.) Section 524(g) authorizes the issuance of a channeling injunction against a nondebtor third party, including the debtor's insurer, when that third party contributes to the trust.[5] (11 U.S.C. § 524(g)(4)(A)(ii)(III).) Apart from this provision, however, section 524(g) does not address any issues relating to insurance.

The absence of statutory language concerning the impact of a section 524(g) confirmation on the debtor's insurers and insurance policies has begun to lead to litigation concerning insurer challenges to confirmation.

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[5] For example, several of Fuller-Austin's primary insurers received the benefit of a channeling injunction upon Plan confirmation.

(See *Asbestos Bankruptcies, supra,* 12 Am. Bankr. Inst. L.Rev. at p. 446 [noting that Fuller-Austin was one of the first significant entities to negotiate a prepackaged bankruptcy under section 524(g)].) In one case, the parties avoided such a challenge by adding a plan provision that permitted the insurers to participate in the resolution and defense of an asbestos claim at the claim allowance stage in the bankruptcy court. (*In re Celotex Corp.* (Bankr. M.D.Fla. 1996) 204 B.R. 586, 615.) Most published cases to date, however, sanction section 524(g) bankruptcy plans that expressly permit insurers to retain their policy rights under state law.

For example, in *In re Combustion Engineering, Inc., supra,* 391 F.3d 190, the bankruptcy plan provided "that nothing in the Plan 'shall in anyway [*sic*] operate to, or have the effect of, impairing insurers' legal, equitable or contractual rights, if any, in any respect.'" (*Id.* at p. 217.) Holding that the insurers did not have standing to challenge plan confirmation, the court concluded that this language demonstrated that the plan did not diminish the insurers' rights or increase their burdens under the subject insurance policies and settlements, as the insurers retained their prepetition rights to dispute coverage and raise claims and defenses to payment. (*Id.* at pp. 217-218.) In *In re Western Asbestos Co.* (Bankr. N.D.Cal. 2004) 313 B.R. 456, the bankruptcy court confirmed a plan with similar language; the plan provided that the debtors' insurance policy rights would vest in a trust and that "such vesting of Insurance Rights shall neither diminish nor impair the enforceability of any of the Asbestos Insurance Policies against a party that is not a Released Party.

Neither shall the vesting of the Insurance Rights in the Trust expand those rights."[6] (*Id.* at p. 462.)

Similar to the foregoing bankruptcy plans, the plan in *In re Mid-Valley, Inc.* (Bankr. W.D.Pa. 2004) 305 B.R. 425 provided that it would "neither diminish nor impair the rights of a party under any Asbestos/Silica Insurance Policy or the rights, if any, of any Asbestos/Silica Insurance Company to assert any claim, defense, or counterclaim in connection therewith." (*Id.* at p. 428.) Explaining that the insurers lacked standing to challenge the plan because they retained all their rights under their policies, the court stated: "The fact that Debtors agreed to pay more to asbestos claimants to settle their liabilities than the certain insurers think Debtors should have agreed to does not create an injury to the certain insurers. The insurers retain rights to dispute whatever they may be asked to pay in future proceedings. Moreover, Debtors' agreement with asbestos claimants to a limit of liability does not bind the certain insurers to pay that same amount. The certain insurers can raise challenges at the appropriate time and place. The insurers' liability under their policies is untouched." (*Id.* at p. 432; see also *In re A.P.I., Inc.* (Bankr. D.Minn. 2005) 331 B.R. 828, 842 [insurers lacked standing to challenge plan where it expressly preserved their state law rights, providing that it did not affect "'the right of any Asbestos Insurance Companies under any Asbestos In-Place Coverage'" and that all insurers "'shall be deemed to have reserved all

[6] This language appears to have addressed the insurers' prior objection that the plan modified their state law contractual policy rights and refuted the debtor's response that section 524(g) preempted the insurers' rights under state law. (See *In re Western Asbestos Co.* (Bankr. N.D.Cal. 2003) 313 B.R. 832, 856-857.)

rights . . . to contest or defend any claims against them on the merits of such claim to the extent permitted under applicable non-bankruptcy law' "]; compare *Baron & Budd, P.C. v. Unsecured Asbestos Claimants* (D.N.J. 2005) 321 B.R. 147, 157-162 [insurers held to have standing to challenge section 524(g) plan confirmation where the trust was funded primarily through insurance proceeds and plan language concerning the impact on insurers remained in flux].)

One would expect the logical consequence of the foregoing bankruptcy plan language to be state law coverage actions involving asbestos claims. But we have not located – nor have the parties cited – any case in the state courts resolving the state law issues left open by a section 524(g) bankruptcy plan that expressly provides it does not affect the debtor's and insurer's policy rights. We therefore turn to the first impression issues raised by the coverage action here.

II. The Phase IB Statement of Decision.

A. Standard of Review and Rules of Policy Interpretation.

Appellants challenge the trial court's interpretation of their insurance policies as they relate to the bankruptcy confirmation under section 524(g). The interpretation of an insurance policy is a question of law which we review de novo. (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 18; *Safeco Ins. Co. of America v. Parks* (2004) 122 Cal.App.4th 779, 789; *Hendrickson v. Zurich American Ins. Co.* (1999) 72 Cal.App.4th 1084, 1089.) But "to the extent the trial court had to review the evidence to resolve disputed factual issues, and draw inferences from the

presented facts, an appellate court will review such factual findings under a substantial evidence standard." (*Shapiro v. San Diego City Council* (2002) 96 Cal.App.4th 904, 912.)

In general, we interpret insurance policies using rules of contract interpretation. (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264.) In *Palmer v. Truck Ins. Exchange* (1999) 21 Cal.4th 1109, 1115, the Court summarized those rules: "'While insurance contracts have special features, they are still contracts to which the ordinary rules of contractual interpretation apply.' [Citation.] Thus, 'the mutual intention of the parties at the time the contract is formed governs interpretation.' [Citation.] If possible, we infer this intent solely from the written provisions of the insurance policy. [Citation.] If the policy language 'is clear and explicit, it governs.' [Citation.] [¶] When interpreting a policy provision, we must give its terms their '"ordinary and popular sense," unless "used by the parties in a technical sense or a special meaning is given to them by usage."' [Citation.] We must also interpret these terms 'in context' [citation], and give effect 'to every part' of the policy with 'each clause helping to interpret the other.' [Citations.]" (Accord, *AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 821-822.)

B. The Effect of the Bankruptcy Court's Confirmation of the Plan.

The focus of the trial court's statement of decision in Phase IB was the impact of the bankruptcy court's section 524(g) Plan confirmation on appellants' indemnity obligations. In general, those obligations arise from the policies' "loss payable" provisions, which appear in each of the excess policies in substantially similar language. Those

provisions generally provide that the excess insurer has no obligation to indemnify the insured until "after the Assured's liability shall have been fixed and rendered certain either by final judgment against the Assured after actual trial or by written agreement of the Assured, the claimant, and [insurer]."

Finding that the bankruptcy confirmation satisfied the "actual trial" requirement of the loss payable provision, the trial court stated: "[T]he Court concludes that the confirmed Bankruptcy Plan ('Plan') served to establish Fuller-Austin's liability for asbestos-related injuries, the quantum of damages to which each asbestos victim is legally entitled, and the procedure for satisfying the liability. . . ." "The policies pay legal obligations after adjudication or compromise (*i.e.,* settlement). The confirmation of the plan of reorganization is, as a matter of law, a judgment. . . . [¶] . . . [¶] . . . [and] the bankruptcy adjudication satisfies the two components of an 'actual trial': '(1) an independent adjudication of facts based on an evidentiary showing; and (2) a process that does not create the potential for fraud and abuse.' [Citations.]" The trial court found that the bankruptcy court's independent review of the Plan and specific findings confirming the Plan constituted an actual trial within the meaning of the policies.

1. Plan confirmation was not an actual trial.

The trial court's finding that the confirmation proceedings amounted to an actual trial is contrary to California law. In *Wolkowitz v. Redland Ins. Co.* (2003) 112 Cal.App.4th 154 (*Wolkowitz*), this District held that a

bankruptcy court order allowing a claim against an insured did not constitute a judicial finding that the insured was liable in the claimed amount. (*Id.* at p. 166.) In *Wolkowitz*, the insured's bankruptcy trustee and the claimant reached an agreement as to the amount of the claim. At a hearing, the bankruptcy court granted the trustee's unopposed motion to approve the agreement and allow the claim. (*Id.* at p. 159.) The trustee then filed an action for breach of contract against Redland, the insurer, alleging "that the bankruptcy court's allowance of [the] claim constituted a 'final judgment' against [the insured] and that Redland is liable to the trustee in that amount." (*Ibid.*)

Affirming the trial court's sustaining of Redland's demurrer, the appellate court reasoned that "a bankruptcy court allowance of a claim does not provide sufficient assurance that a stipulated claim, approved without objection and *without a contested evidentiary hearing*, will accurately or reliably reflect the debtor's actual liability on the claim." (*Wolkowitz, supra,* 112 Cal.App.4th at p. 166.) The *Wolkowitz* court analogized these circumstances to those in *Hamilton v. Maryland Casualty Co.* (2002) 27 Cal.4th 718 (*Hamilton*), where the Court concluded that a stipulated judgment, confirmed in good faith pursuant to Code of Civil Procedure section 877.6, "did *not* amount to a judicial finding that the insured was actually liable in the agreed amount because (1) there was no evidentiary hearing to determine the insured's liability, (2) the settlement resulted from negotiation rather than factfinding, and (3) the purpose of a good faith determination is to ensure that the settling tortfeasor pay no less than its proportionate share of liability, while the insurer's concern is that the insured pay no more than its share. (*Hamilton,*

supra, 27 Cal.4th at pp. 729-730, 117 Cal.Rptr.2d 318, 41 P.3d 128.)" (*Wolkowitz*, *supra*, 112 Cal.App.4th at p. 163.) In the absence of a judicial finding after a contested evidentiary hearing, *Wolkowitz* concluded that the order granting the claim allowance may bind the debtor insured, but not the insurer. (*Id.* at p. 165.)

Like the claim allowance hearing in *Wolkowitz*, the bankruptcy confirmation proceedings here contained none of the attributes of an actual trial. The confirmation hearing was not a contested evidentiary hearing. Indeed, the bankruptcy court expressly limited the scope of the hearing to Fuller-Austin's one-hour presentation of evidence in support of disclosure and the proposed Plan, without any cross-examination. Moreover, the "evidence" offered during the hearing did not address Fuller-Austin's liability; rather, the testimony focused on the Plan's fairness to the claimants. Further, the Plan was the result of negotiation – not fact-finding. As indicated in the disclosure statement and repeated in the bankruptcy court findings, the Plan developed during four months of intense negotiations between DynCorp, Fuller-Austin and representatives of present and future asbestos claimants. Additionally, the key purpose of the bankruptcy court's findings were to ascertain the Plan's good faith and reasonableness as to the asbestos claimants. (See, e.g., *In re General Teamsters, Local 890* (Bankr. N.D.Cal. 1998) 225 B.R. 719, 728-729 [for Chapter 11 plan to be confirmed, it must exhibit fundamental fairness in dealing with creditors].) The bankruptcy court intentionally did not address the Plan's fairness to appellants, as it found that they were "not 'directly and pecuniarily affected'" by the Plan.

Though both *Hamilton* and *Wolkowitz* arose in a different factual context – where the absence of a judicial finding of liability precluded the insureds from seeking damages for their insurers' alleged bad faith refusal to settle – we can discern no reasoned basis to depart from the conclusion reached in those cases that court confirmation of a negotiated settlement lacks the attributes of an actual trial. (See *Hamilton, supra,* 27 Cal.4th at p. 729; *Wolkowitz, supra,* 112 Cal.App.4th at pp. 165-166.)

The two California cases relied on by the trial court do not compel a different result. *Pruyn v. Agricultural Ins. Co.* (1995) 36 Cal.App.4th 500 (*Pruyn*) simply foreshadowed *Hamilton* by finding that a stipulated judgment determined to be made in good faith pursuant to Code of Civil Procedure section 877.6 did not exhibit the attributes of an "actual trial": "'(1) an independent adjudication of facts based on an evidentiary showing; and (2) a process that does not create the potential for abuse, fraud or collusion.'" (*Pruyn, supra,* at p. 517.) At best, such a judgment would be entitled to evidentiary weight as against an insurer that wrongfully refused to defend its insured. (*Id.* at pp. 527-529.) *Pruyn* relied on *National Union Fire Ins. Co. v. Lynette C.* (1994) 27 Cal.App.4th 1434 (*Lynette C.*), the second case cited by the trial court, for its two indicia of an "actual trial." While *Lynette C.* bears some superficial similarity to the instant action to the extent that the trial involved a one and one-half hour uncontested presentation of evidence, any resemblance ends there. In *Lynette C.,* unlike here, the trial court was asked to and did make independent findings on liability and damages. (*Id.* at pp. 1449-1450.) The appellate court expressly contrasted the situation where "the injured party and the insured *resolved* the issues of liability and

damages by *agreement*," concluding that "the uncontested proceeding involved a court independently adjudicating the facts based on an array of evidence." (*Id.* at pp. 1445, 1451.) Significantly, *Lynette C.* further found that the trial court proceeding did not create the potential for fraud or collusion, both because the insurer benefited from a nondisclosure agreement that sealed its insured's court records, thereby limiting the scope of future potential plaintiffs, and because there was significant evidence of the insurer's participation in the events leading up to the uncontested proceeding. (*Id.* at pp. 1451-1452.)

The confirmation proceedings here possessed neither of the *Lynette C.* attributes. Fuller-Austin and the asbestos claimant representatives had resolved all issues before seeking confirmation, and appellants did not participate in prehearing negotiations and were precluded from participating in the confirmation hearing. Accordingly, the bankruptcy court confirmation proceedings were not an "actual trial" within the meaning of the insurance policies.

2. Plan confirmation was a settlement, the effect of which appellants may challenge on retrial.

Our conclusion that the confirmation proceedings were not an actual trial does not end our inquiry. Rather, it leads us to the further question of whether Plan confirmation constituted an agreement or settlement under the policies. According to the policies' loss payable provisions, appellants must indemnify only settlements made with

their written consent.[7] Though concluding it need not reach the issue of consent given its finding that the confirmation proceedings were an "actual trial," the trial court issued conclusions of law and made factual findings that, alternatively, Fuller-Austin was not required to obtain appellants' consent before settling with the asbestos claimants.

In connection with its conclusion that the prebankruptcy negotiations triggered appellants' obligations to Fuller-Austin, the trial court relied on several related legal principles: "An excess insurance company has a duty to accept reasonable settlements on its policyholder's behalf"; "[e]ven if an excess insurance company has not denied coverage or refused to defend, the insurance company has a duty to accept a reasonable settlement, and its refusal to settle may give rise to the insured's action for reimbursement of the settlement"; and "[a]n excess insurance company's right to participate in settlement negotiations and to consent to settlements only arises where it has acknowledged coverage. If an excess insurance company reserves its right to contest coverage, the policyholder is excused from any provision requiring insurance company consent." In addition to these principles, the trial court expressly adopted the following principles with respect to the issue of consent: "'An insurer that has erroneously denied coverage cannot avoid liability for its failure to settle or defend by claiming lack of opportunity to do so. By denying coverage, the insurer waives its right to control defense of the third party action.' . . . [¶] . . .

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[7] The excess policies also incorporate provisions from the underlying policies prohibiting Fuller-Austin from voluntarily settling any claim without the insurer's prior written consent.

'[W]here an insurer does not respond to notice from the insured that it intends to settle with an adversary, the insurer may not then invoke a clause in the policy requiring the insured to obtain approval prior to settling any claims.'"

In terms of factual findings, the trial court characterized the undisputed evidence as establishing that, as of February 1993, Fuller-Austin gave notice to appellants that it may be subject to asbestos claims that would impact its excess and umbrella insurance coverage; that thereafter, it gave appellants notice of potential settlements that it believed would impact their coverage; and that appellants did not pay any portion of the settlements prior to bankruptcy. The trial court also found it "undisputed that (i) Fuller-Austin provided notice to [appellants] that it would entertain global settlement negotiations with representatives of both present and future asbestos claimants with a goal to accomplish a global settlement in conjunction with a filing for bankruptcy, and (ii) Fuller-Austin provided notice to [appellants] of the bankruptcy plan and hearings."

Applying the foregoing legal principles to the undisputed evidence, the trial court found that Fuller-Austin complied with its policy obligations by giving appellants notice of the settlement, that appellants had a duty to Fuller-Austin to accept a reasonable settlement, and that they acted at their own peril by refusing to accept the settlement.[8] In other words, by reserving their rights

[8] The trial court further found that certain presumptions arose from appellants' failure to accept the settlement, which we discuss in section III., *post*.

instead of acknowledging coverage and assuming the defense of the matter, appellants surrendered their right to rely on any policy provision requiring their consent to a settlement.

Appellants do not dispute that Fuller-Austin's bankruptcy reorganization constituted a settlement. Documents filed in the bankruptcy court uniformly characterized the Plan as a "settlement." For example, one section of the disclosure statement captioned "Plan Negotiations" outlined the negotiation process that resulted in the Plan documents, while the following section captioned "Global Settlement" stated: "These negotiations ultimately resulted in a global settlement by Fuller-Austin, DynCorp, the Committee and the Legal Representative which called for the filing of a prepackaged plan of reorganization by Fuller-Austin in the Bankruptcy Court." Similarly, the bankruptcy court findings provided: "The Plan Documents, including without limitation, the CRP, are the product of negotiations and represent a non-collusive settlement among the Debtor, the Committee and the Legal Representative (the 'Global Settlement')."

The settlement, however, is unique to the extent that it establishes criteria and procedures for resolving asbestos claims, but does not serve actually to resolve any claim. Nonetheless, because the Plan is designed to provide a single mechanism for resolving all present and future claims against Fuller-Austin, and, more importantly, because Fuller-Austin has elected to characterize the Plan as a binding resolution of its liability, we find that it possesses indicia of a settlement. Fuller-Austin's conduct distinguishes this matter from *In re A.P.I., Inc., supra,* 331 B.R. 828. There, the court rejected the insurers' argument that they had a right to consent to a settlement

effected by a plan confirmation under section 524(g). It determined that the insurers' fear of collateral consequences stemming from the settlement was unfounded, because the plan expressly provided that it had no binding effect in any other forum. (*In re A.P.I., Inc., supra,* at pp. 844-846.) Though the Plan here contains similar language indicating that appellants' rights are unaffected by the Plan, appellants' concerns regarding the effect of the settlement are well-founded in view of the successful position taken by Fuller-Austin below that confirmation of the section 524(g) Plan was a determination of its liability binding on appellants.

It is undisputed that Fuller-Austin did not obtain appellants' consent to the Plan. Appellants contend that the trial court misapplied the law in concluding that they surrendered their right to consent simply by reserving their right to contest coverage. They assert that only an insurer that has breached its duty to an insured by erroneously denying coverage or a defense waives its right to consent. On an abstract level, their position is correct. California law provides that where an insurer provides a defense to its insured – even under a reservation of rights – the insured may not settle the matter without its insurer's consent. (*Safeco Ins. Co. v. Superior Court* (1999) 71 Cal.App.4th 782, 787 ["When the insurer provides a defense to its insured, the insured has no right to interfere with the insurer's control of the defense, and a stipulated judgment between the insured and the injured claimant, without the consent of the insurer, is ineffective to impose liability upon the insurer"]; accord, *Low v. Golden Eagle Ins. Co.* (2003) 110 Cal.App.4th 1532, 1546-1547; *Wright v. Fireman's Fund Ins. Companies* (1992) 11 Cal.App.4th 998, 1024.) Conversely, "if the insurer wrongfully refuses

to defend, leaving the insured to his own resources to provide a defense, then the insurer forfeits the right to control settlement and defense. In that event, the insured is free to settle the lawsuit on his own, and the insurer is bound by a stipulated judgment. [Citations.]" (*Safeco Ins. Co. v. Superior Court, supra,* 71 Cal.App.4th at p. 787; see also *United Services Automobile Assn. v. Alaska Ins. Co.* (2001) 94 Cal.App.4th 638, 644 ["when an excess insurer denies excess coverage for a third party claim, it waives the right to challenge the reasonableness of the primary insurer's settlement of the claim"].)

Summarized, California law provides that a defending insurer must consent to a settlement in order for there to be coverage, but "if an insurer 'erroneously denies coverage and/or improperly refuses to defend the insured' in violation of its contractual duties, 'the insured is entitled to make a reasonable settlement of the claim in good faith and may then maintain an action against the insurer to recover the amount of the settlement. . . .' [Citation.]" (*Isaacson v. California Ins. Guarantee Assn.* (1988) 44 Cal.3d 775, 791.) The trial court erred in finding that these principles mandated the conclusion that appellants had surrendered their right to consent solely by reserving their rights and not undertaking the defense of the matter. An insurer does not breach any duty to the insured merely by reserving its rights under the policy. (*Prichard v. Liberty Mutual Ins. Co.* (2000) 84 Cal.App.4th 890, 895, 908.) Thus, by reserving their rights to contest coverage, appellants did not wrongfully deny coverage in violation of their policies. Moreover, appellants did not breach any duty to defend Fuller-Austin, as their policies did not contain any defense obligations. Finally, the jury verdict further establishes that appellants did not relinquish their

right to consent to a settlement by reason of any breach of the policies.[9] The jury responded "Did Not Breach" in answer to the question "Did any defendant breach its insurance contract(s) with Fuller-Austin *before* confirmation of Fuller-Austin's Bankruptcy Plan on November 13, 1998?"[10] Accordingly, neither the law nor the facts supports the trial court's conclusion that appellants waived their right to consent to the Plan because they breached their policies by erroneously denying coverage or refusing to defend.

On the other hand, because appellants were neither acknowledging coverage nor providing a defense, and therefore were in no way exercising control over the asbestos claims brought against Fuller-Austin, we find it difficult to permit appellants to rely, without qualification, on a consent provision that is designed to protect defending insurers. (See, e.g., *Low v. Golden Eagle Ins. Co., supra,* 110 Cal.App.4th at pp. 1546-1547 [defending insurer not bound by settlement negotiated by insured without insurer's consent].) Indeed, appellants have not directed us to a case holding that a nonbreaching excess insurer with knowledge of an impending settlement may decline to participate in settlement negotiations, yet then

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[9] Fuller-Austin's failure to pursue its cross-appeal precludes it from challenging the jury's finding no preplan breach by appellants. (E.g., *Kardly v. State Farm Mut. Auto. Ins. Co.* (1995) 31 Cal.App.4th 1746, 1748, fn. 1; *California State Employees' Assn. v. State Personnel Bd.* (1986) 178 Cal.App.3d 372, 382, fn. 7.) This is not the type of situation where reversal of the entire judgment is required because the portion of the judgment adverse to the nonappealing party is so interwoven with and thereby affects the other portions of the judgment. (See *Harvey v. White* (1963) 213 Cal.App.2d 275, 282.)

[10] We address the jury's contrary finding as to LMI's Cities Service coverage in section IV.A., *post.*

rely on the policy's consent provision to avoid responsibility under the settlement.

An insurer and an insured owe reciprocal duties of good faith to one another. (*Commercial Union Assurance Companies v. Safeway Stores, Inc.* (1980) 26 Cal.3d 912, 918 (*Safeway Stores*); *Diamond Heights Homeowners Assn. v. National American Ins. Co.* (1991) 227 Cal.App.3d 563, 578 (*Diamond Heights*).) The nature of each party's duty is to refrain from doing anything that would injure the other's right to receive the benefits of the contract. (*Safeway Stores, supra*, 26 Cal.3d at p. 918.) In view of the nature of excess insurance, the insured has no duty to an excess insurer to accept or reject a settlement offer that protects the insurer from liability. (*Id.* at pp. 919-921.) In other words, an excess insurer "has no legitimate expectation that the insured will '"give at least as much consideration to the financial well-being'" of the insurance company as he does to his "'own interests'" [citation]." (*Id.* at p. 919.) On the other hand, an excess insurer, although not contractually obligated to take an active part in the defense of an insured, still owes its insured a duty of good faith when faced with an offer of settlement that exhausts the underlying policy limits. (*Kelley v. British Coml. Ins. Co.* (1963) 221 Cal.App.2d 554, 563 [excess insurer "obviously under a duty to exercise good faith toward its insured in considering any offer of compromise within the limits of its policy"].)

Diamond Heights provides the most analogous application of these good faith principles as between an excess insurer and its insured. There, a primary insurer sued an excess insurer, seeking contribution toward a stipulated judgment, and the excess insurer (Central) moved for summary judgment on the ground that the settlement

violated a policy provision – a "no-action" clause – requiring its consent. (227 Cal.App.3d at pp. 570-571.) In the settled action, an insured developer had been sued for construction defects. Its primary insurer provided a defense and notified Central that settlement demands exceeded primary coverage and that it was likely primary policy limits would be exhausted. (*Id.* at pp. 569-570, 574.) Central responded by investigating the case, and thereafter reserving its rights under the policy. (*Id.* at p. 575.) A few months later, defense counsel notified Central that both its assessment of the repair work and the plaintiffs' settlement demand exceeded primary policy limits, and sought information on Central's position. Though Central offered to contribute a nominal sum toward settlement, the matter settled on the first day of trial, without Central's contribution and with its objection to the settlement on the record. (*Ibid.*) Defense counsel then sought and obtained an order confirming a good faith settlement pursuant to Code of Civil Procedure section 877.6. The trial court found that the settlement was reasonable and not the product of fraud or collusion, thereby overruling Central's objections on those grounds. (*Diamond Heights, supra,* at p. 575.)

Central's summary judgment motion was premised on the notion that a nonbreaching insurer acts within its contractual rights "whenever it refuses to voluntarily settle a claim and insists on adjudication of the matter on the merits. [Citation.]" (*Diamond Heights, supra,* 227 Cal.App.3d at p. 576.) Though the trial court concluded that summary judgment was warranted, the appellate court reversed. Significantly, it framed the dispositive issues as: "Were the primary insurers entitled to settle the case for an amount which invaded excess coverage without

the excess insurer's consent? Conversely, did the excess insurer have the absolute right under [the policy] to object to and therefore preclude any settlement which invaded excess coverage, even if reasonable and made in good faith, thereby compelling the primary insurer to continue the litigation and provide a defense through trial?" (*Id.* at p. 580.) The court concluded that, subject to certain conditions, "a primary insurer may negotiate a good faith settlement of a claim in an amount which invades excess coverage, and that the primary insurer may enter into such settlement binding upon the excess insurer without the excess insurer's consent," notwithstanding a policy provision requiring consent to a settlement. (*Ibid.*)

The *Diamond Heights* court explained that the good faith duties owed by an excess insurer include the obligation to evaluate settlement options realistically and in good faith where a claim may exceed primary policy limits. (227 Cal.App.3d at p. 580.) "Consistent with its good faith duty, the excess insurer does not have the absolute right to veto arbitrarily a reasonable settlement and force the primary insurer to proceed to trial, bearing the full costs of defense. A contrary rule would impose the same unnecessary burdens upon the primary insurer and the parties to the action, among others, as does the primary insurer's breach of its good faith duty to settle: '" . . . [I]t imperils the public and judicial interests in fair and reasonable settlement of lawsuits. . . .'" [Citations.]" (*Id.* at pp. 580-581.) The court did not leave the excess insurer without any remedy, however. It explained that an excess insurer faced with a settlement that invades its coverage may either assume the defense and settle or try the matter, or challenge the settlement on the grounds of unreasonableness, fraud or collusion. (*Id.* at p. 582.)

The rationale of *Diamond Heights* applies here.[11] It would impose an unnecessary burden on primary insurers and parties to an underlying action to hold that an excess insurer has an absolute right to withhold its consent to a settlement, while at the same time decline to participate in the action. Appellants contend that *Diamond Heights* cannot be applied here. Their first argument focuses on language following the court's good faith discussion. In explaining why its conclusion did not conflict with the insurance policy language requiring consent, the *Diamond Heights* court stated: "[W]e conclude the excess insurer *may* waive its rights under that clause if it rejects a reasonable settlement and at the same time fails to offer to undertake the defense." (227 Cal.App.3d at p. 581.) The court then analogized these circumstances to a primary insurer's breach of the policy, noting that a primary insurer that wrongfully denies coverage, unreasonably delays processing a claim or refuses to defend may be deemed to have waived its right to consent to a settlement "by such conduct constituting a breach of its obligations under the policy." (*Ibid.*) Appellants assert that *Diamond Heights* is simply a restatement of prior authority holding that an insurer that breaches its policy waives its right to consent to a settlement and argue the case is therefore

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[11] We acknowledge that *Diamond Heights* has been criticized, but this criticism revolves around its further conclusion that Central was bound by the good faith settlement determination as a "co-obligor." (*Diamond Heights, supra,* 227 Cal.App.3d at p. 582.) Subsequent cases have clarified that an excess insurer is not conclusively bound by a good faith settlement determination in which it did not participate. (*Hartford Accident & Indemnity Co. v. Superior Court* (1995) 37 Cal.App.4th 1174, 1184; *Pacific Estates, Inc. v. Superior Court* (1993) 13 Cal.App.4th 1561, 1576.) We have not relied on the portion of *Diamond Heights* that addresses the effect of the good faith determination.

inapplicable here because the jury found that appellants did not breach their policies before Plan confirmation.[12] (See, e.g., *Isaacson v. California Ins. Guarantee Assn., supra,* 44 Cal.3d at p. 791.)

We do not read *Diamond Heights* so narrowly. The court did not hold that an excess insurer breaches its policy when it rejects a reasonable settlement and simultaneously declines to undertake the defense. Rather, the court utilized the "somewhat analogous situation" of a primary insurer's breach of policy provisions as an analytical tool to describe the effect of an excess insurer's decision to withhold consent to an otherwise reasonable settlement. (*Diamond Heights, supra,* 227 Cal.App.3d at pp. 580-581.) Indeed, treatises interpreting *Diamond Heights* omit the entire concept of breach in discussing the effect of a settlement made without the excess insurer's consent: "[A] primary insurer may enter into a good-faith settlement of a claim in an amount which invades excess coverage and is binding on the excess insurer without the excess insurer's consent, notwithstanding a 'no action' clause in the excess policy because an excess insurer does not have an absolute right to veto arbitrarily a reasonable settlement and force the primary insurer to proceed to trial, bearing full costs of defense, and the excess insurer waives its right under the 'no action' clause if it rejects a reasonable settlement and, at same time, fails to offer to undertake the defense. [Fn.] Nevertheless, an excess insurer is not without means of avoiding a proposed settlement or challenging final settlement since the excess

[12] As to appellant CNA, which settled before trial, the trial court held on summary adjudication that it had not breached its contract with Fuller-Austin.

insurer may voluntarily waive a policy provision indicating that the excess insurer is not to be called upon to assume charge of settlement or defense, and may agree to undertake the defense (once the primary insurer tenders its full policy limits) and either conduct its own settlement negotiations or take the action to trial, or the excess insurer may challenge the settlement on the ground of unreasonableness or that it is product of collusion between the primary insurer and the insured. [Fn.]" (14 Couch on Insurance (3d ed. 1999) § 204:33, p. 204-48; see also Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2004) ¶ 8:123, p. 8-57 [interpreting *Diamond Heights* to provide that a primary insurer need not obtain the excess insurer's consent to negotiate a good faith settlement of a claim in an amount which invades excess coverage].)

Appellants further assert that *Diamond Heights* is factually distinguishable because the excess insurer there was provided with ample notice of the settlement and therefore had an opportunity to evaluate it, whereas Fuller-Austin provided inadequate notice of and actively excluded appellants from the settlement negotiations. The record does not support their assertion. With respect to the issue of notice, the trial court found it undisputed that Fuller-Austin provided notice to appellants of its settlement negotiations and its goal to effect a global settlement in connection with filing for bankruptcy, as well as notice of the bankruptcy Plan and hearings. Substantial evidence supports these findings. (See *Shapiro v. San Diego City Council, supra,* 96 Cal.App.4th at p. 912.) As early as March 1993, Fuller-Austin notified appellants that existing and future asbestos claims against it could implicate excess coverage. For the next few years, Fuller-Austin

thereafter kept appellants apprised of the asbestos litigation and afforded them access to the underlying claim documents. Moreover, the coverage litigation initiated in 1994 gave appellants access to asbestos claims information through discovery.

The record likewise does not support appellants' claim that Fuller-Austin unreasonably conditioned appellants' participation in the initial meeting to discuss the prepackaged bankruptcy Plan. Though appellants characterize the letter Fuller-Austin sent to them as requiring them to waive all their rights under the policies in order to participate in the meeting, that is not what the letter said. Rather, it stated that Fuller-Austin would not accept appellants' assuming the defense of the action under a reservation of rights, but indicated that appellants could participate in the negotiations if they executed a confidentiality agreement "to protect the privileged nature of the discussions, and to avoid interference with the negotiation process." Substantial evidence supports the trial court's finding that appellants were afforded a reasonable opportunity to participate in the settlement negotiations.

Appellants' final effort to distinguish *Diamond Heights* has some merit. Appellants – unlike the excess insurer in *Diamond Heights* – were precluded from participating in the proceeding that determined the reasonableness of the settlement. (See *Diamond Heights, supra,* 227 Cal.App.3d at p. 575.) Appellants sought to intervene and filed objections to the bankruptcy Plan in the bankruptcy court, but those objections were not considered in view of the court's conclusion that appellants lacked standing. The basis for this conclusion was that appellants' objections could be raised in another forum. During the course of the bankruptcy proceedings, the bankruptcy

court and all parties repeatedly represented that the Plan would have no impact on appellants' claims and defenses in the coverage litigation. The Plan itself confirms this understanding, providing that "all claims and defenses of any Asbestos Insurance Company that is a party to the Coverage Litigation shall be adjudicated in the Coverage Litigation, and all rights of the Asbestos Insurance Companies under the Asbestos Insurance Policies shall remain unaffected by the Plan or the Confirmation Order." (Compare *In re Celotex Corp., supra,* 204 B.R. at p. 615 [insurers were afforded a fair, reasonable and appropriate right to participate where a section 524(g) plan provided that an insurer from whom coverage is sought has the opportunity to participate in the resolution and defense of a claim by contending that the claim should not be allowed or should be allowed in a lesser amount under the claims resolution procedures].)

The *Diamond Heights* court concluded that an excess insurer that does not participate in a settlement is still entitled to protection against unreasonable or collusive settlements, and for that reason may "challenge the settlement on the ground of unreasonableness or that it is a product of collusion between primary insurer and insured." (*Diamond Heights, supra,* 227 Cal.App.3d at p. 582, fn. omitted; see also 14 Couch on Insurance, *supra,* § 199:48, p. 199-92 [an insured may enter into a settlement without the insurer's consent so long as the agreement is "made fairly, with notice to the insurer, and without fraud or collusion on the insurer, and the settlement is reasonable and prudent"], fns. omitted.) In *Diamond Heights,* "Central ... had the opportunity to participate in the [Code of Civil Procedure] section 877.6 hearing, present evidence and arguments, and fully

litigate the issues of good faith and reasonableness." (*Diamond Heights, supra,* at pp. 582-583.)

Here, however, as a result of Fuller-Austin's successful challenge to appellants' effort to intervene in the bankruptcy proceedings, appellants did not have the opportunity in the bankruptcy court to address the issues of fairness, reasonableness and lack of fraud or collusion. The bankruptcy court's "good faith" finding was inadequate to address these issues, as that finding was limited to the Plan's reasonableness as to the asbestos claimants. (See *In re General Teamsters, Local 890, supra,* 225 B.R. at pp. 728-729.) Appellants' interests were not represented at the Plan confirmation hearing. (Cf. *Hamilton, supra,* 27 Cal.4th at p. 729 [good faith settlement hearing does not address an insurer's concerns as to whether its insured is too easily admitting liability or agreeing to pay more than its proportionate share of liability].) Moreover, to conclude that the bankruptcy court's good faith finding adjudicated the issue of reasonableness as to appellants would contradict Fuller-Austin's repeated representations that the Plan and its confirmation did not affect appellants' rights under their policies or their claims and defenses in the coverage litigation.

Allowing Fuller-Austin to enter into a global settlement in the bankruptcy court without appellants' participation, while permitting appellants to challenge the bankruptcy Plan for fairness, reasonableness and lack of fraud or collusion in the instant action, does no violence to the policy language requiring appellants' consent. (*Diamond Heights, supra,* 227 Cal.App.3d at p. 581.) We do not believe that the policies can be read to permit an excess insurer to hover in the background of critical settlement negotiations and thereafter resist all responsibility on the

basis of lack of consent. Nor, however, do we believe that appellants waived all rights under the policies where they attempted to participate in the final stages of the section 524(g) proceedings but were directed to raise their objections in this action. On remand, appellants will be entitled to litigate the issue of whether, as to them, the bankruptcy Plan is unfair, unreasonable or the product of fraud or collusion.

C. The Effect of the Aggregate Value Determination.

A further key feature of the Phase IB statement of decision was its determination that Fuller-Austin would "be entitled to present evidence to a jury regarding its aggregate asbestos liability – *i.e.*, the present liability of Fuller-Austin to pay pending and future asbestos claims," and that the jury's valuation would be binding on appellants. Noting that courts have endorsed certain methodologies for calculating the value of future asbestos claims, the trial court reasoned that future damages are commonly awarded in contract actions where, as here, there is a sufficient method for ascertaining their amount. As additional support for its conclusion, the trial court relied heavily on *UNR Industries, Inc. v. Continental Cas. Co.* (7th Cir. 1991) 942 F.2d 1101 (*UNR Industries*). There, the court held that an order confirming a bankruptcy reorganization was binding on the debtor's insurers; the conclusive effect of the order included the bankruptcy court's determination of the aggregate value of all claims asserted against the debtor. (*Id.* at p. 1105.)

Appellants challenge this determination on the ground it amounts to an unlawful acceleration of their

contractual obligations. They assert that their duty to indemnify Fuller-Austin arises only after damages have been fixed in their amount (e.g., *Certain Underwriters at Lloyd's of London v. Superior Court* (2001) 24 Cal.4th 945, 958 (*Powerine Oil*)) and that a jury's estimation of present and potential future claims against Fuller-Austin is not the equivalent of a fixed amount of damages. We agree. While calculating the aggregate value of present and future asbestos claims is helpful and often necessary in other contexts, no authority exists for utilizing such a valuation to affix an insurer's indemnity obligation. To the contrary, cases addressing the concept of aggregation in the bankruptcy context repeatedly reaffirm its limited scope and purpose. To hold that a jury's estimation of the value of present and potential future asbestos claims is binding on appellants would obligate them to indemnify Fuller-Austin in an amount beyond what their policies provide.

Appellants' excess insurance policies generally provide that appellants must "indemnify the Assured for all sums which the Assured shall be obligated to pay by reason of the liability [¶] (a) imposed upon the Assured by law [¶] . . . [¶] for damages, direct or consequential and expenses, all as more fully defined by the term 'ultimate net loss' on account of: [¶] (i) Personal injuries. . . ." In turn, the policies typically define "ultimate net loss" as "the total sum which the Assured, or any company as his insurer, or both, become obligated to pay by reason of personal injury, property damage or advertising liability claims, either through adjudication or compromise. . . ." Other policies similarly define "loss" as "the sums paid as damages in settlement of a claim or in satisfaction of a judgment for which the insured is legally liable. . . ."

Consistent with these policy provisions, California courts hold that "'the duty to indemnify "entails the payment of money" [citations],' 'has as its purpose "to resolve liability ... *after* liability is established" [citations],' and 'can arise only after damages are fixed in their amount [citations]' [citation]." (*County of San Diego v. Ace Property & Casualty Ins. Co.* (2005) 37 Cal.4th 406, 417; accord *Powerine Oil, supra,* 24 Cal.4th at p. 958 ["the duty to indemnify can arise only after damages are fixed in their amount"]; *Aerojet-General Corp. v. Transport Indemnity Co.* (1997) 17 Cal.4th 38, 56 [by definition, the duty to indemnify "entails the payment of money [citation], which is expressly limited in amount [citation] in order to resolve liability"]; *State of California v. Pacific Indemnity Co.* (1998) 63 Cal.App.4th 1535, 1546 ["The duty to indemnify arises after liability is established and requires payment of money up to the policy limit either to third parties or, in equity, to the insured"].)

The trial court here concluded that the jury's estimation of Fuller-Austin's aggregate asbestos liability would be adequate to establish the amount of Fuller-Austin's present asbestos liability, thereby triggering appellants' duty to indemnify. Cases involving the concept of asbestos claim estimation, however, emphasize both that the purpose of calculating an aggregate claim amount is not to determine liability and that such estimation does not reflect the amount that will be paid to the asbestos claimants. For example, in *Owens Corning v. Credit Suisse First Boston* (D.Del.2005) 322 B.R. 719, the bankruptcy court estimated the value of unliquidated pending and future asbestos claims for the purpose of determining the rights of each class of creditors in the reorganization. The court expressly cautioned that its valuation was for a limited

purpose: "We are not, at this time, deciding how much each claimant will actually be entitled to receive, but the total amount which the claimants, as a group, could legitimately have claimed as compensation, as of the petition date." (*Id.* at p. 722; see also *In re Federal-Mogul Global, Inc.* (Bankr. D.Del. 2005) 330 B.R. 133, 154 [the object of estimating the value of present and future asbestos claims "is to establish the estimated value of a creditor's claim for purposes of formulating a reorganization plan"].)

This authority is consistent with cases generally addressing the limited purpose of bankruptcy claim estimation in the nonasbestos personal injury context. For example, in *Matter of Federal Press Co.* (Bankr. N.D.Ind. 1989) 116 B.R. 650, the court explained that it had the authority to estimate the value of a personal injury claim "to determine the weight to be given the claim for purposes of voting on the debtor's plan of reorganization, and not for the purpose of determining the debtor's ultimate liability for the claim or the amount of the claim for purposes of distribution." (*Id.* at p. 653.) Likewise, the court in *In re Hoffinger Industries, Inc.* (Bankr. E.D.Ark. 2004) 307 B.R. 112, 118, succinctly stated: "This Court may not estimate contingent or unliquidated personal injury or wrongful death claims for purposes of distribution, but may do so for purposes of determining the feasibility of a plan of reorganization." (See also *In re Bicoastal Corp.* (Bankr. M.D.Fla. 1990) 122 B.R. 771, 775 ["Estimation of claims in bankruptcy does not establish a binding legal determination of the ultimate validity of a claim nor a binding determination of any issues"].)

While this authority demonstrates that a bankruptcy court's claim estimation cannot serve as a determination

of the amount to be distributed to an asbestos claimant, we believe it further mandates that a state court jury's estimation of present and future claims cannot be used to establish the amount of Fuller-Austin's liability.[13] To reach a contrary conclusion, the trial court relied on cases holding that future damages are recoverable in a breach of contract action where the amount, but not the fact, of those damages is uncertain. (See *Stott v. Johnston* (1951) 36 Cal.2d 864, 875-876; *Noble v. Tweedy* (1949) 90 Cal.App.2d 738, 745.) Fuller-Austin relies on these and similar cases in an effort to sustain the trial court's determination. (See, e.g., *GHK Associates v. Mayer Group, Inc.* (1990) 224 Cal.App.3d 856, 873 ["Where the *fact* of damages is certain, the amount of damages need not be calculated with absolute certainty"].) But the estimation authorized here involved an entirely different situation – where a jury was asked not only to resolve the amount but also the fact of potential future asbestos claims. As explained in *Noble v. Tweedy, supra,* "an award of damages could not be granted upon the basis of anticipated future injuries or other [purely hypothetical] events. . . ." (90 Cal.App.2d at p. 746, italics omitted.)

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[13] Recently, in *In re A.P.I., Inc., supra,* 331 B.R. 828, the court found no merit to the insurers' concern that a bankruptcy court's finding on the total value of outstanding asbestos related claims would be binding on the insurers in other forums, and specifically added that even such a determination in the ongoing state court coverage action could not have any immediate impact on the insurers: "The feared preclusion would most likely bloom in coverage litigation. However, the insurers did not detail any theory of law under which an 'estimate' of the Debtor's outside personal liability, as a single undifferentiated figure, would translate into any direct jeopardy to the particular insurers' 'pecuniary' rights and duties, at least insofar as adjudication in another forum is concerned and particularly as to any individual claim that would be subject to indemnification." (*Id.* at p. 851, fn. 39.)

To address the problem of inherent uncertainty in a jury's determination of the value of future claims that have not been (and may never be) filed, the trial court reasoned that cases acknowledging and approving of certain types of methodologies to calculate the value of present and future asbestos claims demonstrated a satisfactory method for ascertaining an aggregate asbestos claim value. But consistent with the limited role of bankruptcy claim estimation, those cases sanction the use of expert testimony for purposes other than determining the amount of a debtor's liability. (See *In re Joint E. & S. Dists. Asbestos Litigation* (Bankr. E. & S.D.N.Y. 1993) 830 F.Supp. 686, 689 [expert panel appointed to estimate value of future asbestos claims to ensure that proposed modification of soon-to-be insolvent trust was fair and "no reasonable evaluation of the fairness of a proposed settlement of the class action could be made without a firm grasp of the likely number and value of future claims against the Trust"]; *In re Eagle-Picher Industries, Inc.* (S.D. Ohio 1995) 189 B.R. 681, 682-683 [court relied on expert testimony to estimate value of present and future asbestos claims where valuation was for the purpose of determining the appropriate distributions to creditor classes and not for the purpose of deciding liability or permanently fixing a value for such claims].) These cases demonstrate only that a determination as to the probable number and value of future asbestos claims assists in formulating a reorganization plan, increases a trust's planning capabilities and promotes parity among present and future claimants. (See *In re Joint E. & S. Dists. Asbestos Litigation, supra,* 830 F.Supp. at p. 690.)

Further, the trial court relied on an inapposite case addressing the concept of reinsurance to support its

conclusion that a jury's aggregate estimate of present and future claims could bind not only Fuller-Austin but also appellants. The only similarity between *Ins. Co. of Pennsylvania v. Associated Intern.* (9th Cir. 1990) 922 F.2d 516 (*Associated Intern.*) and the case before us, however, is that both involve asbestos claims. In *Associated Intern.*, a settlement agreement between the insured (Fibreboard) and its primary insurer (ICP) required ICP to pay for "'future, unidentified claims'. . . ." (*Id.* at p. 525.) Relying solely on the language of the reinsurance contract, the court held that the reinsurer (Associated) must indemnify ICP for future claims: "Pursuant to the reinsurance contract, Associated's liability 'shall follow that of [ICP] and shall be subject in all respects to all the terms and conditions of the [ICP-Fibreboard] policy. . . .' Under the ICP-Fibreboard policy, ICP is required 'to indemnify [Fibreboard] for all sums which [Fibreboard] shall be obligated to pay by reason of the liability. . . .' Therefore, since the asbestos claims represent a liability against Fibreboard which it is obligated to pay, ICP must indemnify Fibreboard, and, pursuant to the reinsurance contract, Associated is required to indemnify ICP." (*Id.* at p. 526.) *Associated Intern.* thus stands for the unremarkable proposition that "all sums" a party is "obligated to pay" includes the payment of future claims when a party has contractually obligated itself to pay for those claims. It does not support the trial court's more generalized conclusion that an insurer may be bound to pay for future claims.

Plainly, the centerpiece of the trial court's aggregate value discussion is *UNR Industries, supra,* 942 F.2d 1101. There, when faced with thousands of asbestos claims, UNR petitioned for bankruptcy reorganization. Though the reorganization occurred before the enactment of

section 524(g), the bankruptcy court approved a then-innovative plan whereby UNR transferred most of its stock to a trust, which would fully settle and satisfy all asbestos claims. (*UNR Industries, supra,* at p. 1104.) Significantly, "[t]he reorganization required UNR to pay a sum certain (the stock, which had a market value of $150 million) in satisfaction of the asbestos claims." (*Id.* at p. 1105.) Thereafter, UNR brought an action against two of its excess insurers, including CNA, alleging that they were responsible for at least some of the claims. (*Id.* at p. 1103.) Though the district court dismissed UNR's complaint, the Court of Appeals reversed in part, concluding that the bankruptcy reorganization resulted in a judgment or a settlement binding on CNA under Illinois law. (*Id.* at pp. 1104-1105.)

With respect to the amount of CNA's obligation, the court found that the disclosure statement's valuation of the asbestos claims as being "'2.27 times greater' than the other unsecured claims" yielded $254 million as the real value of the asbestos claims which would be binding on CNA. (*UNR Industries, supra,* 942 F.2d at pp. 1105, 1106.) Despite CNA's not having participated in the valuation, the court found no danger that the valuation was collusive or excessive, as UNR's other creditors also approved the valuation and "[t]his antagonism of interests removes any significant danger that the $254 million valuation of the asbestos victims' claims might contain any artificial inflation at CNA's expense." (*Id.* at p. 1106.)

While appellants assert several bases for distinguishing *UNR Industries* from this matter, we believe a single key distinction renders it inapplicable. *UNR Industries* relied on a bankruptcy court valuation that was based on a finite sum that would be used to settle identifiable

asbestos claims, as the reorganization plan required that all asbestos claims be paid from the amount of stock transferred to the trust. (*UNR Industries, supra,* 942 F.2d at p. 1105.) There is no indication in *UNR* that the negotiated valuation considered claimants who had not yet been identified. Here, in contrast, any estimation of Fuller-Austin's asbestos liability necessarily involves quantifying future and unknown claim amounts. Indeed, any reliance on *UNR Industries* ignores the critical distinction between section 524(g) and other types of bankruptcy, as only section 524(g) permits an entity to shield itself from asbestos liability by diverting not only present, but also future or unknown claimants, to a limited fund for payment. (See *Asbestos Bankruptcies, supra,* 12 Am. Bankr. Inst. L.Rev. at p. 444.) Because *UNR Industries* preceded the enactment of section 524(g), it could not have taken into account the unique features of that provision.

We thus find no authority – and decline to create any – that would permit a jury to estimate the aggregate sum of an insured's liability for present and potential future asbestos claims for the purpose of accelerating its insurers' obligations. (See *In re A.P.I., Inc., supra,* 331 B.R. at p. 851, fn. 39.) Moreover, allowing an aggregate estimate of Fuller-Austin's liability to bind appellants would impermissibly grant Fuller-Austin greater rights under its insurance policies than it had prior to bankruptcy. (See *In re Coupon Clearing Service, Inc., supra,* 113 F.3d at p. 1099; see also *Amatex Corp. v. Stonewall Ins. Co.* (E.D.Pa. 1989) 102 B.R. 411, 414 [estimates of debtor's future asbestos liability "represent only the *possibility* that the [insurance] policies would be triggered" and did not amount to a legal obligation to pay damages under the policies].) Such an estimation does not and cannot represent

the amount that Fuller-Austin is legally obligated to pay and, therefore, does not trigger appellants' indemnification obligations under their policies.

D. The Effect of the Plan's Allowed Liquidated Value Amounts.

Consistent with its conclusion that an aggregate value determination would bind appellants, the trial court further found that appellants were obligated to indemnify Fuller-Austin for the ALV of each claim – not the payment sum percentage that Fuller-Austin will actually pay each claimant. This was error.

The Plan's CRP expressly acknowledge that "there are not sufficient assets in the Debtor's Estate to pay the full and fair value of all Asbestos Claims. Thus, the formation of the Trust is premised upon the overarching goal of the Reorganization Case – maximizing the value of the amount paid to each holder of an Allowed Asbestos Claim. Simultaneously, the Trustees must act in a manner designed to provide substantially the same treatment to each holder of an Asbestos Claim or Demand." To satisfy these competing goals, the CRP give the Trustees plenary power and discretion not only to "determine the Payment Sum Percentage of the Allowed Liquidated Value that will be paid to holders of Allowed Asbestos Claims," but also "to alter the Payment Sum Percentage, the timing, method, and sequencing of payments to holders of Allowed Asbestos Claims, the Asbestos-Related Disease Categories and the Criteria, as well as the power to increase the Allowed Liquidated Value for any Asbestos-Related Disease Category."

The CRP further provide that the amount the Trust is obligated to pay to a claimant holding an Allowed Asbestos Claim varies depending on whether the claimant selects a discounted cash payment or individualized review of the claim. A claimant electing to receive an expeditious, discounted, lump sum payment receives $800. A claimant electing individualized review is entitled to "have his or her Asbestos Claim reviewed, based upon an examination of exposure to asbestos-containing materials sold, installed, or removed by Fuller-Austin, loss, damages, injury causation and other factors determinative of claim value according to applicable tort law, subject to the limitations contained herein." Depending on the type of satisfactory evidence provided by the claimant, the claim is then assigned an ALV ranging from $5,500 to $58,500. The ALV, however, is not the amount that the claimant receives. Rather, according to the CRP, "[i]ndividualized review is intended to result in payments equal to the Allowed Liquidated Value for each claim times the then applicable Payment Sum Percentage, subject to the Trustees' power to change such Payment Sum Percentage as set forth herein."

Appellants' insurance policies indemnify Fuller-Austin for amounts it is "obligated to pay" by law. The CRP establish that the only amount that Fuller-Austin is obligated to pay is each claim's payment sum percentage – not its ALV. (See *In re Mid-Valley, Inc., supra,* 305 B.R. at p. 431 ["The fact that Debtors agree to pay asbestos claimants a certain amount does not mean that the insurers are bound to pay that same amount. The certain insurers' obligation to pay will be determined in coverage litigation"].) The ALV serves only as a model of what would be paid under the best case scenario, assuming that

the payment sum percentage reached 100 percent. While premising appellants' indemnity obligations on the basis of a best case scenario may comport with a strong public policy to compensate victims of asbestos exposure, public policy may not be used to redefine the scope of coverage. (*Ward General Ins. Services, Inc. v. Employers Fire Ins. Co.* (2003) 114 Cal.App.4th 548, 553; see *AIU Ins. Co. v. Superior Court, supra,* 51 Cal.3d at p. 818 ["The answer [to coverage determinations] is to be found solely in the language of the policies, not in public policy considerations"].) The CRP establish that the ALV does not reflect Fuller-Austin's legal obligation to each claimant and therefore cannot be used as the basis for fixing appellants' indemnity obligations.

In large part, the trial court relied on public policy considerations to reach a contrary result. It stated that "the fundamental purposes of the bankruptcy or insolvency provisions of their policies would be thwarted if insurance companies were allowed to escape responsibility based on an insolvent policyholder's inability to pay." But requiring appellants to indemnify Fuller-Austin for amounts it pays to claimants satisfies their responsibility and is consistent with California law and policy requiring that "the insolvency or bankruptcy of the insured will not release the insurer from the payment of damages for injury sustained or loss occasioned during the life of such policy." (Ins. Code, § 11580, subd. (b)(1).) As stated in one of the cases cited by the trial court: Insurance Code section 11580 "is a part of every policy and creates a contractual relation which inures to the benefit of any and every person who might be negligently injured by the insured as completely as if such injured person had been specifically named in the policy. [Citations.] The primary purpose of

the statute is to protect an injured person when the insured is bankrupt or insolvent." (*Johnson v. Holmes Tuttle Lincoln-Merc.* (1958) 160 Cal.App.2d 290, 298.)

Here, each asbestos claimant is protected by requiring appellants to indemnify Fuller-Austin in accordance with their policies. Notably, an asbestos claimant would not receive any greater protection by an order requiring appellants to indemnify Fuller-Austin in the ALV amount of each claim, as such payment would not alter the Plan's payment provisions dictating that each claimant receives only a payment sum percentage of the ALV. Moreover, there is no assurance in the Plan – and no requirement in the CRP – that the Trustees would upwardly adjust the payment sum percentage on the basis of the Trust's increased assets provided by the insurance proceeds. Rather, the Plan expressly allows excess Trust assets to be used both for trust expenses and charitable purposes.

The trial court, as well as Fuller-Austin, relied heavily on *Webster v. Superior Court* (1988) 46 Cal.3d 338, for the proposition that an insurer should not be permitted to limit its liability on the basis of its insolvent insured's ability to pay. *Webster,* however, involved the distinctly different question of whether a personal injury plaintiff should be permitted to proceed with his superior court action against an insolvent insurer (Enterprise), which would permit him to seek recovery from Enterprise's liability insurers, or whether he was limited to a statutory claims proceeding against Enterprise. (*Id.* at pp. 341, 343-344.) In the context of that dispute, the court explained that limiting the plaintiff to the claims procedure could result in a "windfall" to Enterprise's insurers as a result of its insolvency because "[c]laims in bankruptcy and insolvency proceedings, however, are often reduced to a small

fraction of their true value, perhaps only pennies on the dollar. . . . [T]hose insurers would avoid paying damages to the extent [the plaintiff] receives less in the statutory claims proceeding than he would in an ordinary civil action." (*Id.* at pp. 347-348, fn. omitted.) Here, in contrast, each asbestos claimant will receive the same amount regardless of whether appellants are obligated to indemnify Fuller-Austin in the ALV amount or the payment sum percentage amount. The concerns expressed in *Webster* are not present here.

The trial court also relied on Plan language (without quoting it) purportedly indicating that the ALV of each claim is the amount of Fuller-Austin's legal obligation. As indicated earlier, however, we read the Plan as expressly and unambiguously permitting the Trust's obligations to be satisfied by payment of the payment sum percentage. Conversely, in certain circumstances Fuller-Austin's legal obligation may exceed the ALV. The CRP provide that a claimant who disputes that his or her claim is satisfied by the payment sum percentage may seek either arbitration or a jury trial, and that the ALV is not binding under those circumstances. Accordingly, we do not read the Plan and its CRP as providing that Fuller-Austin's legal obligation to each claimant is the ALV amount.[14] (See, e.g., *Williams v. American Cas. Co.* (1971) 6 Cal.3d 266, 271

[14] Nor do we find that the principles governing reinsurance have any applicability to these circumstances. Rather, the relationship between an insurer and a reinsurer is governed by the particular terms of their contract, which generally do not permit the reinsurer to pay an amount less than the insured's claim because of the insurer's insolvency. (E.g., *Allemannia Ins. Co. v. Firemen's Ins. Co.* (1908) 209 U.S. 326, 331; *Koken v. Reliance Ins. Co.* (Pa. Cmwlth. 2004) 846 A.2d 167, 171.)

["'an appellate court is not bound by the findings of the trial court [but] [o]n the contrary, it is the duty of the appellate court . . . to make its own independent determination of the meaning of the language used in the instrument under consideration'"].)

Finally, although the trial court did not cite *UNR Industries, supra,* 942 F.2d 1101, in support of its ALV determination, Fuller-Austin contends that *UNR Industries* provides ample support for the trial court's determination. There, the appellate court reversed the district court's determination that the amount of UNR's indemnifiable loss was the amount it would actually pay to asbestos victims with valid claims, explaining that: "[T]his approach threatens to confer a windfall on CNA at the asbestos victims' expense. [¶] The reason for the potential windfall is that UNR paid the Trust only a portion of the asbestos victims' actual damages in the bankruptcy proceedings. This discounting of the asbestos victims' damages had nothing to do with the merits of their claims. The discounting merely reflected the amount of UNR's assets that the asbestos victims could reach. CNA may profit greatly from UNR's bankruptcy if its obligations are based on the arbitrarily discounted amount that the asbestos victims actually receive from the Trust." (*Id.* at p. 1105.)

Implicit in the *UNR Industries* court's reasoning is the notion that there is a direct relationship between the amount that CNA pays into the trust and the amount that each asbestos victim will receive. As discussed earlier, however, the Plan here makes no provision for such a relationship. In other words, nothing in the Plan states that the payment sum percentage received by each asbestos claimant is directly affected by the level at which

insurance proceeds are recovered. While certainly there may be some indirect effect to the extent that the payment sum percentage can change on the basis of total Trust assets, such a tenuous relationship affords no basis for imposing an indemnification obligation on appellants in the ALV amount. We therefore decline to follow *UNR Industries* on this point. Appellants are not required to indemnify Fuller-Austin in the ALV amount of each claim; their obligation is to indemnify Fuller-Austin for the amount the Plan obligates it to pay for each allowed claim.

E. Summary of Phase IB Rulings.

We reverse the Phase IB statement of decision to the extent it determined that appellants had waived all rights under their policies to object to the reasonableness of the settlement afforded by the bankruptcy confirmation, that the jury was entitled to make a binding determination as to the aggregate value of all present and future asbestos claims, and that the ALV amount of each claim would be binding on appellants. On remand, appellants will be entitled to assert that the bankruptcy Plan is unfair, unreasonable or the product of fraud or collusion as defenses to Fuller-Austin's breach of contract and declaratory relief action. Because we have found the bankruptcy settlement to be valid as between Fuller-Austin and the asbestos claimants, as well as to appellants subject to their limited ability to challenge the settlement as it relates to their obligations, the Trust's evaluation and resolution of each claim will suffice as a determination of Fuller-Austin's liability on each claim. Appellants retain their prebankruptcy rights under the policies to raise defenses to coverage as to each claim for which liability has been established. (E.g., *In re Combustion Engineering,*

Inc., supra, 391 F.2d at pp. 217-218; *In re Western Asbestos Co., supra,* 313 B.R. at p. 462; *In re Mid-Valley, Inc., supra,* 305 B.R. at p. 432.)

Our conclusion that appellants' indemnity obligations have not yet been fixed does not preclude Fuller-Austin from pursuing its action against appellants. (*Earth Elements, Inc. v. National American Ins. Co.* (1995) 41 Cal.App.4th 110, 116-117 ["The insured may sue to enforce the insurer's duty to defend and indemnify without a final judgment being entered in the underlying third party action"].) Once raised and determined in this action, any findings on the issues of the Plan's fairness, reasonableness and fraud or collusion will be binding on all asbestos claims tendered to appellants under their policies. (See, e.g., *A.I. Credit Corp., Inc. v. Aguilar & Sebastinelli* (2003) 113 Cal.App.4th 1072, 1078 [collateral estoppel requirements]; *County of Los Angeles v. County of Los Angeles Assessment Appeals Bd.* (1993) 13 Cal.App.4th 102, 108 [same].)

III. The Jury Trial.

While appellants First State, CNA and International settled with Fuller-Austin following Phase IB, appellants LMI and Stonewall proceeded to a jury trial phase on Fuller-Austin's breach of contract claims. Our conclusion that the trial court erred in permitting the jury to calculate an aggregate value of all present and potential asbestos claims – coupled with our conclusion that the ALV is not the appropriate indemnification amount – necessarily requires reversal of the jury's damages findings. Specifically, the judgment must be reversed as to special verdict question numbers 11 through 21, and with respect to the

trial court's damages findings stemming from the jury's responses to those questions.

Appellants LMI and Stonewall – as well as appellant CNA which did not participate in the jury trial phase – contend that the jury's liability findings must also be reversed by reason of two prejudicial instructional errors: (1) The trial court instructed the jury that present and future asbestos claims were presumed to be harm within the policies' coverage – in effect, shifting the burden of establishing noncoverage of those claims to appellants; and (2) it instructed the jury that the bankruptcy court had found the settlement to be reasonable, thereby removing the issue of reasonableness from the jury's purview.

We agree with appellants that the instruction concerning the presumption of harm within coverage was erroneous and misstated the law. We further conclude that reversal of the jury's liability findings is warranted because it is reasonably probable that the presumption of harm instruction affected the verdict. (See, e.g., *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 580.) The reasonableness instruction was not erroneous in the context of the other instructions. However, because the special verdict form did not permit the jury to make any finding on the central issue of reasonableness, the jury's liability findings must be reversed for this reason as well.

A. The Trial Court Erroneously and Prejudicially Instructed the Jury that the Asbestos Claims were Presumed to be Harm Within Coverage.

As part of the Phase IB statement of decision, the trial court ruled: "The asbestos liabilities adjudicated in the

bankruptcy are presumed to be harm within coverage. *Armstrong* [*World Industries, Inc. v. Aetna Casualty & Surety Co.* (1996)] 45 Cal.App.4th [1,] 85 [(*Armstrong*)]. It is Joint Defendants' burden at trial to prove otherwise." Consistent with that ruling, the trial court instructed the jury: "The Court has determined that the asbestos bodily injury claims resolved in the bankruptcy proceedings are presumed to be harm within the coverage provided by the insurance policies issued by the insurance companies in this action. What this means is that the bodily injury claims resolved in the bankruptcy are presumed to arise from exposure to Fuller-Austin products before or during the insurance companies' policy periods. Defendants have the burden of proving otherwise." Appellants objected to this instruction.

This instruction is directly contrary to the well-established principle that "[t]he burden is on an insured to establish that the occurrence forming the basis of its claim is within the basic scope of insurance coverage." (*Aydin Corp. v. First State Ins. Co.* (1998) 18 Cal.4th 1183, 1188; accord *Weil v. Federal Kemper Life Assurance Co.* (1994) 7 Cal.4th 125, 148; *Searle v. Allstate Life Ins. Co.* (1985) 38 Cal.3d 425, 437-438; *Shell Oil Co. v. Winterthur Swiss Ins. Co.* (1993) 12 Cal.App.4th 715, 758.) This inveterate authority demonstrates that the initial burden of establishing harm within coverage falls on the insured, not the insurer.

The trial court misread *Armstrong* to impose the burden of establishing coverage on appellants. The page of the *Armstrong* decision cited by the trial court discusses the exception articulated in *Isaacson v. California Ins. Guarantee Assn., supra,* 44 Cal.3d 775 to the "general rule placing the burden on the policyholder to establish facts to

trigger coverage. . . ." (*Armstrong, supra,* 45 Cal.App.4th at p. 85.) The exception is implicated by an insurer's erroneous denial of coverage, erroneous refusal to defend or refusal to accept a reasonable settlement: "In such a case, the insured has the burden of showing the settlement was reasonable and if it meets that burden, then again the act of settlement raises two presumptions: that the claim was legitimate and that the amount of the settlement was the amount of the insured's liability. [Citation.]" (*Ibid.*) Stated another way, when an insurer refuses to accept a settlement that the insured proves was reasonable, "then the insured is entitled to a presumption in his favor – a presumption that the insured is indeed liable to the claimant and that the amount of his liability is the amount of the settlement." (*Ibid.*)

The presumption derived from *Armstrong,* thus, involves the extent of the insured's liability; that is, an insured is relieved from the burden of establishing both the fact and amount of its liability where the insurer has failed to accept a reasonable settlement. But whether an insured is liable to the claimant is a distinctly different issue from whether such liability amounts to a covered claim. *Armstrong* did not hold that an insured is entitled to a presumption that such liability falls within coverage under any circumstances. Instructing the jury that the asbestos claims against Fuller-Austin were presumed to be harm within coverage plainly misstated the law and erroneously shifted the burden to appellants to disprove a critical element of Fuller-Austin's claim against appellants. (See *Buzgheia v. Leasco Sierra Grove* (1997) 60 Cal.App.4th 374, 393 [instructing that the wrong party has the burden of proof on a dispositive issue "is a major instructional error"].)

This instruction was prejudicial because it likely misled the jury. "'Article VI, section 13 of the California Constitution provides that error in instructing the jury shall be grounds for reversal only when the reviewing court, "after an examination of the entire cause, including the evidence," concludes that the error "has resulted in a miscarriage of justice." The test of reversible error has been stated in terms of the likelihood that the improper instruction misled the jury. [Citation.]' [Citations.] Thus, if a review of the entire record demonstrates that the improper instruction was so likely to have misled the jury as to become a factor in the verdict, it is prejudicial and a ground for reversal. [Citation.]" (*Huffman v. Interstate Brands Corp.* (2004) 121 Cal.App.4th 679, 703-704; see also *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 983 [no inherent prejudice from erroneous burden-shifting instruction].) To measure the likelihood of whether the jury was misled, "we must evaluate '(1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled.'" (*Buzgheia v. Leasco Sierra Grove, supra,* 60 Cal.App.4th at pp. 393-394, quoting *Soule v. General Motors Corp., supra,* 8 Cal.4th at pp. 580-581, fn. omitted.)

Considering these factors in order, there was essentially no evidence that the asbestos claims satisfied the policies' indemnity provisions requiring injury resulting from exposure to Fuller-Austin's asbestos-containing products. Rather, the testimony and documentary evidence concerning the existence of asbestos claims focused on their timing, volume and procedural treatment by the Trust. Evidence that these claims resulted from Fuller-Austin products was based primarily on testimony that

relied on statistical probabilities of exposure and resulting injury. For example, one liability assessment expert testified: "When we do our analysis we look at the sum total of the individual's exposure to asbestos, whether it be purely Fuller-Austin's asbestos or someone else's asbestos. [¶] . . . [The models] are based on the full duration of asbestos, not exposure to a particular company's product." No evidence was offered linking these claims to Fuller-Austin's specific products. But the erroneous instruction to presume coverage likely misled the jury into believing that such evidence was unnecessary for Fuller-Austin to meet its burden. (See *Huffman v. Interstate Brands Corp., supra,* 121 Cal.App.4th at p. 704; see also *Rancho Santa Fe Pharmacy, Inc. v. Seyfert* (1990) 219 Cal.App.3d 875, 880 ["'"Burden of proof" means the obligation of a party to establish by evidence a *requisite degree of belief* concerning a fact in the mind of the trier of fact or the court.' . . . [¶] The party having the burden of proof must offer evidence so that the trier may have a basis for finding in his favor"].)

No other instructions cured the error in the presumption of coverage instruction. Rather, other instructions reinforced the error by informing the jury that a presumption arises where the court instructs that it exists and "[i]f a presumption arises, the party opposing the presumption then has the burden to overcome it by a preponderance of the evidence." Likewise, in closing argument Fuller-Austin's counsel focused the jury on the erroneous instruction, stating: "[T]he court told you yesterday the court has determined that the asbestos bodily injury claims resolved in the bankruptcy proceedings are presumed to be harm within the coverage provided by the insurance policies issued by the insurance companies in this action. [¶] What

that means is that the bodily injury claims resolved in the bankruptcy are presumed to arise from exposure to Fuller-Austin products before or during the insurance company's [*sic*] policy periods. [¶] The defendants have the burden of proving otherwise." (See *Pool v. City of Oaklar'* (1986) 42 Cal.3d 1051, 1070 [in assessing prejudice, court considers "'whether respondent's argument to the jury may have contributed to the instruction's misleading effect'"].) Finally, questions from the jury suggest that it moved quickly past the issue of coverage, as the jury's first question was a request to have copies of reports estimating the number of future asbestos claims to be filed.

On the basis of the foregoing factors, it is reasonably probable that a result more favorable to appellants would have been reached had the jury been properly instructed that Fuller-Austin bore the burden of showing coverage. Instructing the jury that the asbestos claims were presumed to be harm within coverage was prejudicial error.

B. The Trial Court did not Err in Instructing the Jury on the Reasonableness of the ALV Amount, but it Erroneously and Prejudicially Precluded the Jury From Reaching a Verdict on the Issue of the Bankruptcy Plan's Reasonableness.

In connection with informing the jury of the ALV amounts determined by the bankruptcy court, the trial court instructed: "The Bankruptcy Court further determined that these amounts are reasonable, were negotiated in good faith among the parties to the bankruptcy, and constitute a binding liability of Fuller-Austin to the asbestos claimants." Appellants objected to this instruction.

Appellants contend that this instruction was prejudicially misleading – conveying the impression that the bankruptcy court had already conclusively determined the issue of reasonableness. The instruction, however, was far too limited to have had such an impact. Rather, the instruction expressly limited the issue of reasonableness to the ALV amounts. Moreover, other instructions correctly informed the jury of the limited effect of the bankruptcy court findings. For example, the trial court instructed: "The insurers in this case were not parties to those bankruptcy proceedings. . . . Because these insurers were not parties to the bankruptcy proceedings, the Bankruptcy Court made no findings and determinations relating to them." It also gave an instruction concerning the factors the jury may consider in determining whether a settlement opportunity was reasonable. "'The instructions must be considered in their entirety, and if, as so considered, they state the law of the case fairly and clearly, then they are, as a whole, unobjectionable, even though by selecting isolated passages from single instructions they may in some respects be amenable to just criticism.' [Citations.]" (*Little v. Stuyvesant Life Ins. Co.* (1977) 67 Cal.App.3d 451, 464.) When considered as a whole, the instructions did not convey the misleading impression that the issue of reasonableness had already been determined.

But despite instructions asking the jury to consider the issue of the settlement's reasonableness, the special verdict did not require the jury to make any finding on the issue of reasonableness. This omission is significant because a special verdict "requires the jury to resolve all of the controverted issues in the case, unlike a general verdict which merely implies findings on all issues in one

party's favor." (*City of San Diego v. D.R. Horton San Diego Holding Co., Inc.* (2005) 126 Cal.App.4th 668, 678.) Appellants requested that the special verdict form include a separate finding as to whether the bankruptcy settlement was reasonable. (See *Shaffer v. Debbas* (1993) 17 Cal.App.4th 33, 47, fn. 3 [appellant must object to or otherwise challenge special verdict form in the trial court to allege error on appeal].) Fuller-Austin objected, and the trial court refused to include a special verdict question concerning reasonableness.

As discussed in Section II.B.2., *ante,* an excess insurer that does not participate in a settlement need not indemnify an unreasonable or collusive settlement, and thus is entitled to challenge the settlement on the grounds of unreasonableness or collusion. (*Diamond Heights, supra,* 227 Cal.App.3d at p. 582; see also 14 Couch on Insurance, *supra,* § 199:48, p. 199-92.) Here, the jury was asked to find whether the bankruptcy Plan was the product of unclean hands or collusion. Consistent with the law, the jury was instructed that Fuller-Austin was guilty of unclean hands if it committed misconduct that violated conscience or good faith. (E.g., *Kendall-Jackson Winery, Ltd. v. Superior Court* (1999) 76 Cal.App.4th 970, 979.) Unclean hands, however, is not the equivalent of unreasonableness.

Thus, the jury's finding that Fuller-Austin was not guilty of inequitable misconduct did not answer the distinctly different question of whether the bankruptcy Plan was unreasonable. (See *Isaacson v. California Ins. Guarantee Assn., supra,* 44 Cal.3d at pp. 792-793 [addressing insured's need to show reasonableness of settlement before recovering from insurer].) As explained in *Myers Building Industries, Ltd. v. Interface Technology, Inc.*

(1993) 13 Cal.App.4th 949: "'Unlike a general verdict (which merely *implies* findings on all issues in favor of the plaintiff or defendant), a special verdict presents to the jury each ultimate fact in the case. The jury must resolve all of the ultimate facts presented to it in the special verdict, so that "nothing shall remain to the court but to draw from them conclusions of law." [Citation.] [¶] The requirement that the jury must resolve every controverted issue is one of the recognized pitfalls of special verdicts.'" (*Id.* at pp. 959-960; accord *City of San Diego v. D.R. Horton San Diego Holding Co., Inc., supra,* 126 Cal.App.4th at pp. 678-679; *Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 285; *Falls v. Superior Court* (1987) 194 Cal.App.3d 851, 854-855.)

The special verdict here did not permit the jury to resolve the controverted issue of the bankruptcy Plan's reasonableness. As such, it was fatally defective and affords an additional basis for reversal of the jury's liability findings.

IV. LMI's and Stonewall's Challenges to the Judgment.

Appellants LMI and Stonewall challenge the special verdict findings that were unique to their policies and are independent of the effect of the bankruptcy proceedings. With our permission, Fuller-Austin filed a separate respondent's brief addressing those challenges. Though we need not discuss all points raised by LMI and Stonewall in view of the necessity of reversal for the reasons outlined above, we resolve the challenged special verdict

findings that have not yet been addressed and those that may be implicataed on retrial.[15]

A. LMI.

LMI issued four "Cities Service" policies covering personal injury claims against certain contractors, including Fuller-Austin, who performed work at a site in Louisiana between May 1966 and April 1971. The Cities Service policies are governed by Louisiana law. Effective in March 1998, Fuller-Austin formalized a March 1997 settlement agreement with 658 asbestos claimants in Louisiana represented by William Baggett (the Baggett settlement), which called for a total payment of $3,948,000 to be paid to the claimants. Though Fuller-Austin repeatedly asked LMI to participate in the settlement negotiations and the settlement itself, LMI declined to do so.

Under the Baggett settlement, an initial $600,000 payment was due in June 1998 and paid by one of Fuller-Austin's primary insurers; the balance was due on the earlier of December 31, 1998; 90 days after bankruptcy plan confirmation; or upon a settlement or judgment and disbursement of funds in the coverage litigation. None of those events occurred before the Trust approved and

[15] Specifically, we do not address LMI's claims that the trial court erred in finding that the bankruptcy settlement exhausted the underlying policies as a matter of law, that Fuller-Austin failed to meet its burden to establish coverage under the Cities Service policies and that Fuller-Austin failed to demonstrate that the minimum attachment points were satisfied for each of the Cities Service policies. These issues are moot in view of our other conclusions. Nor do we address Stonewall's claim that the trial court abused its discretion by awarding prejudgment interest.

assumed the $3.4 million balance of the Baggett settlement as part of the Plan confirmation.

1. The jury's finding that LMI breached the Cities Service policies before bankruptcy confirmation is unsupported as a matter of law.

The jury found that LMI breached the Cities Service policies before Fuller-Austin's bankruptcy Plan was confirmed in November 1998. The asserted breach was LMI's refusal to indemnify Fuller-Austin for any of the asbestos claims that were the subject of the Baggett settlement. LMI contends that the jury's finding of breach is not supported by substantial evidence because LMI's payment obligations under the Baggett settlement were not yet due before Fuller-Austin's bankruptcy Plan was confirmed.

We need not reach the issue of whether substantial evidence supported the verdict because we conclude that, as a matter of law, Fuller-Austin had no claim against LMI for a prebankruptcy breach of the policy. The jury was instructed in accordance with the general principle that an insurer owes a good faith duty to its insured to accept a reasonable settlement offer within policy limits, and its refusal to settle gives rise to a cause of action for breach of the implied covenant of good faith and fair dealing. (E.g., *Kransco v. American Empire Surplus Lines Ins. Co.* (2000) 23 Cal.4th 390, 401; *Wolkowitz, supra,* 112 Cal.App.4th at p. 162.) As with any cause of action for breach of contract, an essential element of a cause of action for breach of the implied covenant based on the refusal to settle is resulting damages. (*Hamilton, supra,* 27 Cal.4th at p. 726.) Generally, damages for such a breach are measured by the

amount of the judgment rendered against the insured after trial on the underlying claim, including any portion of the judgment that exceeds policy limits. (*Id.* at p. 725; *Kransco v. American Empire Surplus Lines Ins. Co., supra,* 23 Cal.4th at p. 401.) Where the insured does not proceed to trial but instead settles with the claimant, an essential element of the cause of action for breach of the implied covenant is lacking. As we explained in *Finkelstein v. 20th Century Ins. Co.* (1992) 11 Cal.App.4th 926, 929: "[A]n insured does not have a cause of action for breach of the implied covenant of good faith and fair dealing when the insurer does not settle upon the insured's demand and the insured then strikes his own deal with the third party claimant to settle the action."

Finkelstein controls here. Fuller-Austin's entering into the Baggett settlements eliminated the possibility that it would suffer a judgment in excess of policy limits on those claims. Without that possibility, Fuller-Austin cannot show that it was damaged by LMI's refusal to settle. (*See Finkelstein v. 20th Century Ins. Co., supra,* 11 Cal.App.4th at p. 930 ["Since there was no judgment in excess of the policy limits, [the insured's] cause of action never matured"].) Because an essential element of Fuller-Austin's breach of contract claim was lacking as a matter of law, the jury's verdict finding a prebankruptcy breach of the Cities Service policies must be reversed.

2. The trial court erred in applying a continuous trigger to determine coverage under the Cities Service policies.

In cases involving claims of continuous injury, courts have adopted various theories to determine the liability of successive insurers, including the theories of exposure,

manifestation or continuous injury. (*Lynette C., supra,* 27 Cal.App.4th at p. 1462.) California applies the continuous injury trigger to claims involving continuous injury or damage, which means that "bodily injury and property damage which is continuous or progressively deteriorating throughout several policy periods is potentially covered by all policies in effect during those periods." (*Montrose Chemical Corp. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645, 689.) In the Phase IB statement of decision, the trial court acknowledged that Louisiana has adopted an exposure trigger, but nonetheless concluded that a continuous trigger should apply to all insurance policies, including the Cities Service policies, because "a continuous trigger will fulfill Louisiana's stated policy of maximizing insurance coverage under the circumstances presented by Fuller-Austin." We review de novo the trial court's interpretation of the law. (See *Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 916.)

In *Cole v. Celotex Corp.* (La. 1992) 599 So.2d 1058 (*Cole*), the Louisiana Supreme Court addressed the issue of what trigger applies to asbestos claims and unambiguously concluded "that the exposure theory is a sound one and [we] adopt that theory as a precept of this court." (*Id.* at p. 1076.) Under the exposure theory, coverage is triggered by exposure to the harmful conditions during the policy period. (*Id.* at pp. 1075-1076 & fn. 51.) To support its adoption of the exposure theory, the court relied on the three reasons articulated in *Ins. Co. North America v. Forty-Eight Insulations* (6th Cir. 1980) 633 F.2d 1212 which reached the same conclusion. "First, the exposure theory comports with a literal construction of the policy language: '"[b]odily injury" should be construed to include the tissue damage which takes place upon initial inhalation of

asbestos.' [Citation.]. . . . Second, under the facts, the exposure theory would maximize coverage. [Citation.] Third, the exposure theory honors the contracting parties' intent by providing for consistency between the insured's tort liability and the insurer's coverage." (*Cole, supra*, 599 So.2d at pp. 1076-1077.)

The concurring opinion in *Cole* expressed concern that "the court may have stopped short in its consideration and analysis. The exposure theory is clearly superior to the manifestation theory. But the triple-trigger theory appears to set forth an even more comprehensive definition of 'injury,' encompassing the period from initial exposure to manifestation, because it comports with what is known and unknown about the etiology and progress of diseases. [Citation.] Consequently, it should be noted that although the court did not consider the triple-trigger thoroughly here, because it would have made no difference, that theory should be reconsidered and applied in future cases in which it produces a more just result." (*Cole, supra,* 599 So.2d at p. 1086, Dennis, J., concurring.) In the Phase IB statement of decision, the trial court expressly relied on the *Cole* concurrence's reference to future cases, observing that it was unaware of any subsequent Louisiana case either adopting or rejecting a continuous trigger theory. For that reason, it believed it was at liberty to conclude that Louisiana would adopt a continuous trigger under the circumstances presented here.

Our review of Louisiana case law, however, reveals that application of the exposure trigger to claims of continuous injury is a firmly established part of Louisiana law. (See *Norfolk Southern Corp. v. Calif. Union Ins.* (La. App. 1 Cir. 2003) 859 So.2d 167, 192 [applying exposure trigger to injury resulting from long-term environmental

damage]; see also *Powell v. Weaver* (La. 2003) 841 So.2d 742, 744 [noting that "in the more than ten years since its issuance, there has been no legislative response to the holding in *Cole*"]; cf. *Armstrong World Industries, Inc. v. Aetna Casualty & Surety Co., supra,* 45 Cal.App.4th at p. 41 [recognizing that Louisiana applies an exposure trigger theory].) Equally as significant, the Louisiana cases that have rejected the exposure theory in other contexts have not adopted the continuous trigger theory. For example, in *Oxner v. Montgomery* (La.App. 2 Cir. 2001) 794 So.2d 86, the court applied a manifestation theory to insurance coverage for residential property damage resulting from a faulty foundation, reasoning that "under the exposure theory, an insurer would arguably remain a guarantor of its insured's actions forever. We reject such an inequitable result." (*Id.* at p. 93; see also *St. Paul Fire & Marine Ins. v. Valentine* (La.App. 1 Cir. 1995) 665 So.2d 43, 47, 48 [applying manifestation trigger to coverage for fire damage resulting from defectively installed wiring, noting that "the holding in *Cole* is limited to cases of a similar nature and was not intended to have application beyond those types of cases"].)

When applying the law of another state, the court's duty is to ascertain and apply the existing law – not to predict that the state might change the law and then apply its own notion of what that change may or should be. (*Cabrera v. City of Huntington Park* (9 Cir. 1998) 159 F.3d 374, 378; cf. *Hughes Electronics Corp. v. Citibank Delaware* (2004) 120 Cal.App.4th 251, 264 ["In construing another state's statutory law, a definitive construction of that statute by the state's highest court is entitled to great deference"].) The Louisiana Supreme Court has held that coverage for asbestos claims is determined by applying an

exposure trigger theory. No case has held to the contrary. Moreover, contrary to the *Cole* concurrence, other Louisiana courts have indicated that the trend of the state is to apply the more restrictive manifestation trigger theory when presented with the opportunity to do so. Accordingly, there is no basis for the trial court's extension of Louisiana law applying a continuous trigger theory to determine coverage under the Cities Service policies. Rather, coverage must be determined in accordance with Louisiana law, which applies an exposure trigger. (*Cole, supra*, 599 So.2d at pp. 1076-1077.)

B. Stonewall.

1. Substantial evidence supports the jury's finding that Fuller-Austin was a named insured under Stonewall Policy 12173.

The jury answered "Yes" to the first special verdict question: "Was Fuller-Austin an 'insured' under Stonewall Policy No. 12173 (what we have been referring to as the Dynalectron policy)?" Stonewall contends the evidence was insufficient to support this finding. In resolving a challenge to a verdict based on sufficiency of the evidence, we review the record as a whole, resolving all conflicts in favor of the prevailing party and indulging all legitimate and reasonable inferences in favor of the verdict, to determine whether substantial evidence supports the verdict. (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 571.) If there is substantial evidence – contradicted or uncontradicted – to support the finding, it must be upheld regardless of whether the evidence is subject to more than one interpretation. (*Ibid.*)

The evidence showed that Stonewall Policy 12173 was issued to Dynalectron (also known as DynCorp), effective December 31, 1973 and cancelled on December 31, 1975. The policy contained an endorsement defining the named insured as "Dynalectron Corporation ... and/or any subsidiary allied or affiliated company" and providing a qualification that "no coverage shall apply to any entity in which the named insured acquires an interest during the term of the policy unless said acquired interest is reported to the company within sixty (60) days of date of acquisition." At the time the policy was issued, DynCorp did not own Fuller-Austin. Stonewall contends the evidence established that Ful-Aus, Inc., a subsidiary of DynCorp, acquired the stock of Fuller-Austin in May 1974, and that neither DynCorp nor Ful-Aus provided notice of the acquisition within the requisite 60-day period. Rather, DynCorp gave notice via a letter dated August 15, 1974.

At best, however, the evidence on this point conflicted. According to Ful-Aus's articles of incorporation and the minutes of its May 30, 1974 initial board of directors' meeting, Ful-Aus was incorporated in May 1974, with DynCorp as its sole shareholder. Though there was some suggestion in the June 14, 1974 minutes of a special meeting of Ful-Aus's board of directors (and in documents and a declaration that were not in evidence during the jury trial) that Ful-Aus had previously acquired Fuller-Austin as its wholly-owned subsidiary, a purchase agreement dated July 11, 1974 purported to effect the transfer of all outstanding shares of Fuller-Austin's stock to DynCorp and Ful-Aus. Fuller-Austin's former president echoed this conflict in the documentary evidence, testifying at one point that DynCorp bought Fuller-Austin on July 11, 1974,

while stating on cross-examination that the relevant transaction occurred in May 1974.

Conflicts in the evidence will not support a reversal for lack of substantial evidence. (*Oldham v. Kizer* (1991) 235 Cal.App.3d 1046, 1065.) Furthermore, as our Supreme Court explained in *Clemmer v. Hartford Insurance Co.* (1978) 22 Cal.3d 865, 878, even internally inconsistent testimony from a single witness may support a judgment. "It is for the trier of fact to consider internal inconsistencies in testimony, to resolve them if this is possible, and to determine what weight should be given to such testimony." (*Ibid.*) When the record contains substantial evidence, "no matter how slight it may appear in comparison with the contradictory evidence, the judgment must be upheld" (*Howard v. Owens Corning* (1999) 72 Ca1.App.4th 621, 631.) Substantial evidence demonstrated that DynCorp complied with the notice requirement of the endorsement to Stonewall Policy 12173, thereby supporting the jury's finding that Fuller-Austin was a named insured under the policy.

2. The trial court properly instructed the jury that Stonewall Policy 12173 had a $50 million aggregate limit.

Under the heading "Limit of Liability," Stonewall Policy 12173 provides for an "aggregate for each annual period during the currency of this Policy separately in respect of . . . Personal Injury" of $25 million. Endorsement No. 5 to that policy further provides: "It is agreed that in no event will this policy provide a total limit of liability greater than $25,000,000 each occurrence and in the aggregate from all coverages combined, subject to the terms and conditions of each respective insuring form."

Before Phase II of the trial began, the trial court preliminarily determined that the policy provided $25 million overall aggregate limit. At the conclusion of Phase II, after hearing argument and receiving extrinsic evidence concerning the policy's meaning, the trial court reconsidered its position and determined that Stonewall Policy 12173 provided a $50 million overall aggregate limit. (See *Darling, Hall & Rae v. Kritt* (1999) 75 Cal.App.4th 1148, 1156 [trial court has inherent authority to reevaluate its own interim rulings].) The jury was instructed in accordance with this determination, and subsequently awarded Fuller-Austin $50 million under the policy.[16]

Stonewall asserts that the trial court's interpretation of Stonewall Policy 12173 is erroneous because the policy's language unambiguously provided for a $25 million overall aggregate limit, and, even assuming some ambiguity, the evidence considered by the court was not probative of the parties' mutual intent. Alternatively, it contends that the trial court erred by failing to consider the impact of Fuller-Austin's seeking coverage for only a single occurrence, which should have been subject to a $25 million limit.[17] We review these contentions de novo. As stated in *Cooper Companies v. Transcontinental Ins. Co.* (1995) 31 Cal.App.4th 1094, 1100: "Unless the interpretation of the instrument turns upon the credibility of conflicting extrinsic evidence, a

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[16] Though we must reverse this award for the reasons outlined in section II., *ante*, we address this issue of policy limits because it will likely recur at some point in future proceedings.

[17] Stonewall does not contend that the jury should have resolved the question of the policy's meaning given the existence of extrinsic evidence; nor does it assert that the trial court's preliminary ruling precluded it from offering extrinsic evidence before the jury relevant to its construction of the policy. We therefore do not address those points.

reviewing court makes an independent determination of the policy's meaning. [Citations.]"

According to Stonewall, any seeming conflict in the policy's limit of liability language is resolved by the general rule that where "there is a conflict in meaning between an endorsement and the body of the policy, the endorsement controls." (*Continental Cas. Co. v. Phoenix Constr. Co.* (1956) 46 Cal.2d 423, 431, accord *Aerojet-General Corp. v. Transport Indemnity Co.* (1997) 17 Cal.4th 38, 50, fn. 4; *Mission National Ins. Co. v. Coachella Valley Water Dist.* (1989) 210 Cal.App.3d 484, 497.) But an insurance policy endorsement does not exist in a vacuum. Rather, "an endorsement is an amendment to or modification of an existing policy of insurance. It is not a separate contract of insurance. Standing alone, an endorsement means nothing. 'Endorsements on an insurance policy form a part of the insurance contract [citation], and the policy of insurance with the endorsements and riders thereon must be construed together as a whole [citation].' [Citation.] 'Conditions stated in the policy as such apply to the endorsement.' [Citation.]" (*Adams v. Explorer Ins. Co.* (2003) 107 Cal.App.4th 438, 451.)

Here, the Endorsement No. 5 expressly provides that it is "subject to terms and conditions of each respective insuring form." Notably, this language differs from that in other endorsements. For example, Endorsement No. 3 regarding cancellation for nonpayment of premium states that it applies "irrespective of any other terms or conditions contained in this policy or endorsements attached thereto. . . ." On its face, therefore, Endorsement No. 5 unambiguously provides that it is "subject to" the annual limit of liability provisions in the policy. (See *Barrett v. Farmers Ins. Group* (1985) 174 Cal.App.3d 747, 751

[noting that even though an endorsement may afford certain types of coverage that would not otherwise be available under the policy, "the endorsement is part of the policy and is subject to the conditions which limit the amount of the recovery"]; see also *Vons Companies, Inc. v. United States Fire Ins. Co.* (2000) 78 Cal.App.4th 52, 62 [explaining that a self-insured retention which "expressly stated that it was 'subject to' all of the policy's terms and conditions" was unambiguous and "controlled by the various terms and conditions of the [insurance] policy"].) Contrary to Stonewall's assertion, this construction does not render the endorsement meaningless. Rather, as the endorsement expressly applies to "all coverages combined," it can reasonably be read as dictating a $25 million combined limit for general liability and aviation coverage – the latter of which is contained in a separate endorsement.

In addition to the policy language, the extrinsic evidence offered to the trial court concerning the policy's aggregate limit demonstrated that the trial court properly construed Stonewall Policy 12173 as providing a $25 million annual aggregate limit. (See *Morey v. Vannucci* (1998) 64 Cal.App.4th 904, 912 ["Even if a contract appears unambiguous on its face, a latent ambiguity may be exposed by extrinsic evidence which reveals more than one possible meaning to which the language of the contract is yet reasonably susceptible"].) We find no merit to Stonewall's contention that the trial court improperly relied solely on a letter written by a claims representative that purported to describe the parties' mutual intent. To the contrary, the record reflects that three witnesses testified that the policy provided $50 million overall aggregate limit and that the purpose of the endorsement was to clarify the

impact of multiple coverages. Fred Anderson who worked for Stonewall's underwriting company beginning in 1974 testified: "[H]ere we have two policy forms, a following form excess for the aviation and protection and indemnity. And then we also have an excess umbrella form. [¶] And the endorsement is meant to clarify that although there are two sets of underlying – two basic forms, that Stonewall is exposed for only 25 in all." Likewise, Courtney Nason, who worked for the surplus lines broker that helped negotiate Stonewall Policy 12173, testified that the policy contained a $25 million annual aggregate limit and a $50 million overall aggregate limit, and added that Endorsement No. 5 was added to provide for an overall annual limit when the excess liability for aircraft exposures was added. Finally, James Healy, an employee of DynCorp's insurance broker who was also involved in negotiating Stonewall Policy 12173, testified consistently with respect to the policy's limit and the purpose of the endorsement. All three witnesses testified that they were unaware of Stonewall or any other insurance company ever issuing a multi-year policy with a single aggregate limit.

This evidence was probative of the parties' mutual intent at the time they entered into the policy. (See *American-Hawaiian Steamship Co. v. Home Sav. and Loan Assn.* (1974) 38 Cal.App.3d 73, 81 [evidence relevant to prove the parties' intention in making a contract "includes the circumstances surrounding the contract's execution, its object, nature, and subject matter, and the situation of the parties at the time of contracting"].) Where, as here, the extrinsic evidence is not in conflict, the interpretation of a policy is a legal issue to be decided by the court. (*Continental Cas. Co. v. Phoenix Constr. Co., supra,* 46 Cal.2d at

pp. 429-430, 431; *Maryland Casualty Co. v. Nationwide Ins. Co.* (1998) 65 Cal.App.4th 21, 29.) On the basis of this evidence, the trial court properly determined as a matter of law that the policy provided a $50 million overall aggregate limit.

We do not find that the policy's "per occurrence" limit leads to a different conclusion. Stonewall contends that Endorsement No. 5's reference to "each occurrence" having a $25 million limit of ability, coupled with Fuller-Austin's interrogatory response that it was seeking coverage for a "single occurrence," mandates a coverage limit of $25 million under Stonewall Policy 12173. As explained above, however, the endorsement is expressly "subject to" the terms and conditions of the policy. Though Stonewall characterizes the policy as providing different terms and condition for occurrence limits versus aggregate limits, the policy expressly defines the occurrence limit as $25 million for "ultimate net loss in all in respect of each occurrence – subject to a limit of [$25 million] aggregate for each annual period. . . ." Notwithstanding Fuller-Austin's interrogatory response, the trial court properly construed the policy as a matter of law as providing a $25 million annual limit for Fuller-Austin's claims. (See *Employers Ins. of Wausau v. Granite State Ins. Co.* (9th Cir. 2003) 330 F.3d 1214, 1219-1221 [under California law, where a single "occurrence" takes place but causes damage during more than one policy period, the insured may recover up to each policy limit against multiple insurance policies].)

3. The trial court improperly declined to apply the "prior insurance" clause to claims involving continuous injury.

In a postverdict hearing, Stonewall and other insurers argued that the trial court must apply the "prior insurance" clause in their policies to reduce their policy limits. The trial court "decline[d] to limit the coverage based upon the prior insurance provision" as written. We address the trial court's ruling here, as the application of the prior insurance clause will be relevant to Stonewall's future indemnity obligations following retrial.

The prior insurance clause in Stonewall Policy 12173 provides: "It is agreed that if any loss covered hereunder is also covered in whole or in part under any other excess Policy issued to the Assured prior to the inception date hereof the limit of liability hereof as stated in Items 5 and 6 of the Declarations shall be reduced by any amounts due to the Assured on account of such loss under such prior insurance."

The purpose of a prior insurance clause (sometimes also referred to as a "noncumulation" clause) is to prevent the insured from receiving a double recovery for the same injury. (See *Liberty Mut. Ins. Co. v. Black & Decker Corp.* (D.Mass. 2004) 383 F.Supp.2d 200, 216.) Though the parties have not directed us to any California case addressing the enforcement of a prior insurance clause, courts in other jurisdictions routinely enforce prior insurance clauses.[18] (E.g., *Liberty Mut. Ins. Co. v. Treesdale, Inc.*

[18] Prior insurance clauses are not enforced in jurisdictions that, unlike California, require "pro-rata" insurer liability for continuing injury claims. (E.g., *Outboard Marine v. Liberty Mut. Ins. Co.* (1996) 283 Ill.App.3d 630, 644-645 [670 N.E.2d 740] [to apply a prior insurance

(Continued on following page)

(3d Cir. 2005) 418 F.3d 330, 339-345; *Endicott Johnson Corp. v. Liberty Mut. Ins. Co.* (N.D.N.Y. 1996) 928 F.Supp. 176, 181-182.) In *In re Liquidation of Midland Ins. Co.* (N.Y.A.D. 2000) 269 A.D.2d 50, 63-64, 709 N.Y.S.2d 24, 34, the court held that a prior insurance clause containing identical language to that here "clearly provide[d] that [the insurer's] $20 million coverage obligation to [the insured] would be reduced by any sums owed to the insured] by other excess policies on the same risk" for asbestos liability. (See also *Hercules, Inc. v. AIU Ins. Co.* (Del.Supr. 2001) 784 A.2d 481, 493-495 [holding prior insurance clause limited insurer's liability where insurers were jointly and severally liable for continuing damage].)

The trial court did not articulate its reason for declining to enforce the prior insurance clause, nor has Fuller-Austin asserted any argument on appeal in support of the trial court's ruling.[19] We see no basis for the trial court's ruling. Rather, the foregoing authority compels the conclusion that the prior insurance clause in Stonewall Policy 12173 is unambiguous and enforceable. In view of the procedural posture of this matter, however, we are guided by the court's comments in *Liberty Mut. Ins. Co. v. Black & Decker Corp., supra,* 383 F.Supp.2d 200, where the court

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clause where the excess insurer is only paying a pro rata portion of the total damages attributable to a continuing occurrence would give the insurer a double credit and would deprive the insured of the full value of its premium].)

[19] The cases referenced by Fuller-Austin purporting to dispose of the prior insurance clause address the different question of whether a single "occurrence" that spans more than one policy year can trigger successive policies that provide per-occurrence-per-year limits. (See *Employers Ins. of Wausau v. Granite State Ins. Co., supra,* 330 F.3d at pp. 1220-1221; *Stonewall Ins. Co. v. City of Palos Verdes Estates* (1996) 46 Cal.App.4th (810, 1849.)

explained that although it found a prior insurance clause to be "unambiguous and enforceable, and eminently sensible besides," it was uncertain how to apply the clause to the facts before it, given the prior insurance coverage amount had not yet been determined. (*Id.* at p. 216.) Accordingly, the court deferred its decision concerning the actual application of the clause and stated: "For now, suffice it to say that the clause appears to be enforceable, but its implications on the present facts are unclear and need not be decided until an actual problem emerges. [The insurer] will be deemed to have preserved the issue within the context of this litigation assuming it raises the clause again if and when a concrete issue arises." (*Ibid.*) The same outcome is mandated here. We therefore reverse the trial court's ruling declining to enforce the prior insurance clause and hold that Stonewall has preserved the issue of the clause's application when that issue becomes relevant to its indemnity obligations.

4. Substantial evidence did not support the jury's verdict as to Stonewall Policy D11366.

Stonewall Policy D11366 (the Olin Policy) was unique in that it applied only to work performed on a specific subcontract at a specific location. The policy was effective between January 3 and January 24, 1973, and was "limited to completion of the Insured's sub-contract 92045-1 at the Olin Corporation plant near Lake Charles, Louisiana, or to operations incidental to the completion of this project." Consistent with the terms of the policy, the trial court instructed the jury: "As to Stonewall Policy No. D11366, Fuller-Austin has the burden of proving by a preponderance of the evidence all of the facts necessary to

establish the existence of third-party bodily injury occurring between January 3, 1973 and January 24, 1973 resulting from the completion of the Fuller-Austin Subcontract 92045-1 at the Olin Corporation plant near Lake Charles, Louisiana, or operations incidental to the completion of that Subcontract." The jury determined that Stonewall's liability for both pending and future asbestos claims was $536,506 under the Olin Policy.

Stonewall contends that the evidence is insufficient to support the Olin Policy verdict.[20] In evaluating this contention, we view the record in the light most favorable to the Fuller-Austin, resolving all evidentiary conflicts in its favor and drawing all reasonable inferences to support the judgment. (*Jessup Farms v. Baldwin* (1983) 33 Cal.3d 639, 660; *In re Marriage of Mix* (1975) 14 Cal.3d 604, 614.) Even applying this deferential standard, however, we cannot conclude that the jury's verdict on the Olin Policy is supported by substantial evidence. (See *Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651 [substantial evidence is "of ponderable legal significance, evidence that is reasonable, credible and of solid value"]; *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [substantial evidence "'must actually be "substantial" proof of the essentials which the law requires in a particular case'"].)

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[20] This verdict requires reversal both because it purports to award an amount against Stonewall for future claims and because the jury was erroneously instructed concerning a presumption of coverage arising from these claims. We address this matter separately, however, because a reversal for insufficiency of the evidence – unlike a reversal for legal or instructional error – requires that judgment be entered for Stonewall. (Code Civ. Proc., § 629; *Bank of America v. Superior Court* (1990) 220 Cal.App.3d 613, 623-624.)

The only evidence offered concerning asbestos claims at the Olin plant was the testimony of Mark Peterson, Ph.D., who conducted statistical analyses of pending and projected future asbestos claims against Fuller-Austin. With respect to Fuller-Austin's liability for asbestos claims arising from exposure at the Olin plant in January 1973, Dr. Peterson estimated the value of those claims to be $5.6 million. He derived this value by considering that the Trust had processed 37 claims involving exposure at the Olin plant during the relevant time period, and then forecasting the number of future claims that would be filed on the basis of assumptions concerning the ratio of currently approved claims to projected approved claims.

Dr. Peterson's projections did not rise to the level of substantial evidence demonstrating asbestos claims arising out of the completion of the subcontract at the site specified in the Olin Policy. (See *Roddenberry v. Roddenberry, supra,* 44 Cal.App.4th at p. 651 [expert opinions based on conjecture or speculation are not substantial evidence].) Dr. Peterson conceded that his methodology was not designed to predict how many claims and disease types would emanate from a specific site. Moreover, a random sampling of 7 of the 37 processed claims demonstrated that none of them necessarily involved work on the subcontract or during the three-week period covered by the Olin Policy. Dr. Peterson's testimony was comparable to that proffered in *Whiteley v. Phillip Morris, Inc.* (2004) 117 Cal.App.4th 635, 701-702, where the expert testimony did not attempt to quantify the likelihood that asserted cigarette design defects, as distinguished from smoking cigarettes in general, had contributed to the plaintiffs lung cancer and was thus insufficient to support a finding that the defendant's negligence caused the plaintiff's injuries.

Likewise, here there was no evidence quantifying the number of processed or when projected claims that stemmed from completion of the subcontract specified in the Olin Policy, as distinguished from the number of claims asserted generally against Fuller-Austin. Accordingly, the jury's $536,506 verdict against the Olin Policy must be reversed.

DISPOSITION

The judgment is reversed to the extent it imposes liability on appellants, to the extent it requires appellants to pay an aggregate sum for present and potential future asbestos claims against Fuller-Austin, and to the extent that any indemnification was calculated on the basis of the ALV amount of any claim. More specifically, the Phase IB statement of decision, incorporated as part of the judgment, is reversed as to the trial court's rulings on the trigger of coverage on the Cities Service policies (Issue No. 9) and the excess policy triggers (Issue No. 3), the latter of which encompasses rulings concerning the bankruptcy adjudication as a judgment, the obligation to pay the ALV amount of the claims and the obligation to pay an aggregate sum for present and potential future claims. The special verdict, also incorporated as part of the judgment, is reversed as to questions 2, 3 and 4 (as to the Cities Service coverage only), 5, 6, 9 through 17, 19 and 20. The judgment's damages calculations premised on those special verdict questions are also reversed. In all other respects, the judgment is affirmed. The matter is remanded for retrial in accordance with the views expressed herein. Appellants to recover their costs on appeal.

CERTIFIED FOR PARTIAL PUBLICATION.

_____, J.
DOI TODD

We concur:

_____, P.J.
BOREN

_____, J.
ASHMANN-GERST

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

FULLER-AUSTIN INSULATION COMPANY, *Plaintiff,* vs. FIREMAN'S FUND INSURANCE COMPANY, *et al.*, *Defendants.*	CASE NO. BC 116835 Honorable Judith C. Chirlin Department 89 NOTICE OF ENTRY OF FINAL JUDGMENT

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD HEREIN:

PLEASE TAKE NOTICE that the attached judgment was entered in this action on August 1, 2003, setting forth the Court's Statements of Decision in Phase 1A and Phase 1B and the Special Verdicts rendered by the jury in Phase

II. This judgment provides that plaintiff Fuller-Austin shall recover from defendants the following:

1. From defendants Presently Solvent Certain Underwriters at Lloyd's London and Presently Solvent Certain London Market Insurance Companies (General Insurance Policies) the sum of $63,271,270 together with interest thereon at the rate of ten percent per annum from the date of entry of judgment until paid and prejudgment interest in the amount of $1,067,386.

2. From defendants Presently Solvent Certain Underwriters at Lloyd's London and Presently Solvent Certain London Market Insurance Companies (Cities Service Insurance Policies) the sum of $16,291,408 together with interest thereon at the rate of ten percent per annum from the date of entry of judgment until paid and prejudgment interest in the amount of $274,836.

3. From defendant Highlands Insurance Company the sum of $57,400,000 together with interest thereon at the rate of ten percent per annum from the date of entry of judgment until paid and prejudgment interest in the amount of $968,338.

4. From defendant Stonewall Insurance Company (Policy No. 12173) the sum of $50,000,000 together with interest thereon at the rate of ten percent per annum from the date of entry of judgment until paid and prejudgment interest in the amount of $843,500.

5. From defendant Stonewall Insurance Company (Policy No. D11366) the sum of $536,506 together with interest thereon at the rate of

ten percent per annum from the date of entry of judgment until paid.

In addition, costs are to be awarded to Fuller-Austin as the prevailing party, and are to be determined pursuant to Fuller-Austin's cost statement to be filed with the Court and any motions to tax.

ZEVNIK HORTON LLP

August 1, 2003 By: /s/ [Illegible]
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ANDERSON KILL
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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

FULLER-AUSTIN INSULATION COMPANY, *Plaintiff,* vs. FIREMAN'S FUND INSURANCE COMPANY, *et al.*, *Defendants.*	CASE NO. BC 116835 Honorable Judith C. Chirlin Department 89 JUDGMENT (Filed Aug. 1, 2003)

This matter came on regularly for trial commencing December 4, 2001.[1] The trial thereafter was conducted in three phases until conclusion on May 5, 2003. Phase I was divided into two separate bench trials, referred to as "Phase IA" and "Phase IB." After Phase IA and Phase IB of the trial, the Court rendered statements of decision on certain legal issues relating to policy interpretation. In Phase II, a jury was impaneled to try certain factual issues and special verdicts were rendered. The Court

[1] Prior to the commencement of trial proceedings, this Court ruled on various motions for summary adjudication. On December 22, 1999, the Court ruled in favor of Stonewall Insurance Company, Highlands Insurance Company, Certain Underwriters at Lloyd's London and Certain London Market Companies on the parties' Motion for Summary Adjudication of the Fourth Cause of Action (for Anticipatory Breach of Contract). In that ruling, which is incorporated by reference herein, the Court held that "the final judgment in this action shall, in addition to any matter determined at trial, award judgment in accordance with the matters so adjudicated" on that motion relating to the Fourth Cause of Action.

hereby enters judgment and sets forth certain declarations based on these proceedings.

Phase I of the trial addressed nine legal issues, with various subparts, for the Court's determination. These nine legal issues were framed and recommended by Judge Frederick Lower (Ret.), who was appointed by the Court as a referee pursuant to Code Civ. Proc. § 639 in order to assist the Court in formulating a trial management plan. After briefing by and meetings with the parties, Judge Lower issued recommendations regarding the phasing of trial and the identification of legal issues. Judge Lower's recommendations were adopted by the Court, without objection from the parties, on December 1, 2000.

As framed by Judge Lower and the parties, the Phase I issues involved questions of law and interpretation of insurance contracts, and were tried to the Court. *Parsons v. Bristol Development Co.*, 62 Cal.2d 861, 865 (1965).

The Phase IA trial commenced on December 4, 2000 and the parties rested on December 18, 2000. After post-trial briefing, closing arguments were held on May 14 and 15, 2001. In the Phase IA trial, the Court resolved the following legal issues as framed in the trial management proceedings before Judge Lower:

> *Ineorporation*: The resolution of disputes concerning (a) the content of policies, and (b) the incorporation of lower level policy language into upper level policies, *i.e.*, what language in lower level policies is relevant and what language is to be incorporated.
>
> *Exhaustion*: What method of exhaustion is appropriate in this case; exhaustion of immediately underlying policies or exhaustion of all underlying

insurance, in any years, *i.e.*, horizontal or vertical exhaustion?

On July 20, 2001, the Court issued its Statement of Decision on these two issues.[2] On July 31, 2003, the Court issued a revised Phase IA Statement of Decision correcting Scrivner's errors. The revised Phase IA Statement of Decision, which sets forth the Court's rulings and authorities, is attached hereto at Tab A and incorporated herein by this reference.

Following its decision in Phase IA, the Court set trial on the remaining seven legal issues to be tried in Phase IB. The Phase IB trial commenced on September 10, 2001. After post-trial briefing, closing arguments were heard on December 11 and 12, 2001. In the Phase IB trial, the Court resolved the following legal issues as framed in the trial management proceedings before Judge Lower:

Paid or Held Liable to Pay: What is the legal effect of policy language that requires the underlying carrier to "have paid or have been held legally liable to pay the full amount of their respective limits of liability" before an excess carrier's obligation arises.

(a) Is actual payment in cash, in full, or at all, required before an excess carrier's obligations are triggered?

(b) Does payment of underlying limits to the insured rather than to third party claimants constitute exhaustion?

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[2] In a prior ruling, the Court determined that California law would apply to all of the insurance contracts except the London Market policies sold to Fuller-Austin with regard to the Cities Service facility in Lake Charles, Louisiana. As to these Cities Service policies, the Court determined that Louisiana law would apply.

(c) Does installment payments of underlying limits to the insured constitute exhaustion?

(d) Does an underlying insurer's assertion of exhaustion, contested by the insured, constitute exhaustion?

(e) Does an insured's assertion that its underlying coverage has been exhausted establish the fact of exhaustion binding upon its excess insurers?

Excess Policy Triggers: Are any of the policies at issue here triggered if Fuller-Austin's "liabilities" exceed the policies' attachment points?

(a) What "liabilities" are to be considered?

(b) Are there critical dates for determining "liabilities?" If so, what are those dates?

Trigger Dates: Are there critical dates or events for determining if excess insurers' obligations have been triggered? If so, what are those dates?

Exhaustion As A Matter of Law: Has exhaustion occurred as a matter of law because of the ruling in *Phoenix Ins. Co. v. U.S. Fire Ins. Co.*, 189 Cal. App. 3d 1511, 235 Cal. Rptr. 185 (1987)?

Drop Down: What is the legal effect of "drop down" provisions in "excess" policies or in "umbrella" policies?

Impact of Insolvencies: What is the legal effect of insolvencies of underlying insurers?

Trigger of Coverage: Under California and/or Louisiana law do the Joint Defendants' policies respond on a "continuous trigger" basis?

On March 20, 2002 the Court issued its Phase IB Statement of Decision on these issues. On August 6, 2002, the Court issued a modified Phase IB Statement of Decision. The Phase IB Statement of Decision is attached hereto at Tab B and incorporated herein by this reference.

Phase II consisted primarily of a jury trial and commenced with the selection of the jury on February 10, 2003. Opening statements commenced on February 18, and closing arguments concluded on April 11, 2003, at which time the jury began its deliberations. After a juror was excused and an alternate juror was seated, jury deliberations began again on April 21, 2003. The jury returned its special verdict on May 2, 2003, at which time the verdict was sealed. The verdict was unsealed on May 5, 2003, and read in open court at that time. The jurors were thereafter polled on their decisions.

The jury impaneled for the Phase II trial determined certain issues between Fuller-Austin and the remaining three insurance company defendants, those solvent Underwriters at Lloyd's and the solvent London Market Insurance Companies that subscribed severally to the insurance policies at issue in this litigation, Highlands Insurance Company, and Stonewall Insurance Company.[3] The jury returned the following Special Verdict on May 2, 2003:

---

[3] Between Phase IB and the Phase II trial, three groups of insurance company defendants reached settlement with Fuller-Austin. In accordance with the settlements, these three groups of defendants reserved the right to pursue an appeal as to certain issues. Accordingly, the Court enters separate judgments concurrently herewith as to (i) Columbia Casualty Company and Transcontinental Insurance Company, (ii) First State Insurance Company, New England Reinsurance

(Continued on following page)

"We, the jury find the following:

Question No. 1:

It is Fuller-Austin's burden to prove by a preponderance of the evidence the answer to the following question.

QUESTION: Was Fuller-Austin an "insured" under Stonewall Policy No. 12173 (what we have been referring to as the Dynalectron policy)?

Check "Yes" or "No"

Yes	No
X	

[If you answer "No" to Question No. 1, do not answer any other question regarding Stonewall policy no. 12173.]

Question No. 2:

It is Fuller-Austin's burden to prove by a preponderance of the evidence the answer to the following question.

QUESTION: Has any claimant who has filed or will file a claim against Fuller-Austin sustained bodily injury occurring from January 3, 1973 through January 24, 1973 as a result of the completion of Fuller-Austin's Subcontract No. 92045-1 at the Olin Corporation plant near Lake Charles, Louisiana (Olin Policy) or operations incidental to the completion of that subcontract?

Corporation, and Twin City Fire Insurance Company, and (iii) International Insurance Company.

Check "Yes" or "No"

Yes	No
X	

[If you answer "No" to Question No. 2, do not answer any other question regarding Stonewall Olin Policy.]

Question No. 3

It is Fuller-Austin's burden to prove by a preponderance of the evidence the answer to the following question.

QUESTION: Did any defendant breach its insurance contract(s) with Fuller-Austin *before* confirmation of Fuller-Austin's Bankruptcy Plan on November 13, 1998?

Check "Breached" or "Did Not Breach" for each defendant below.

	Breached	Did Not Breach
Certain Underwriters at Lloyd's, London and Certain London Market Insurance Companies (General Coverage)		X
Certain Underwriters at Lloyd's, London and Certain London Market Insurance Companies (Cities Service Coverage)	X	
Highlands Insurance Company		X
Stonewall Insurance Company (Policy No. 12173)		X
Stonewall Insurance Company (Olin Policy)		X

Question No. 4:

It is Fuller-Austin's burden to prove by a preponderance of the evidence the answer to the following question.

QUESTION: As to any breach you found in Question no. 3 above, was that breach the cause of any damage to Fuller-Austin?

	Yes	No
Certain Underwriters at Lloyd's, London and Certain London Market Insurance Companies (General Coverage)	____	____
Certain Underwriters at Lloyd's, London and Certain London Market Insurance Companies (Cities Service Coverage)	X	____
Highlands Insurance Company	____	____
Stonewall Insurance Company (Policy No. 12173)	____	____
Stonewall Insurance Company (Olin Policy)	____	____

Question No. 5:

It is Fuller-Austin's burden to prove by a preponderance of the evidence the answer to the following question.

QUESTION: Did any defendant breach its insurance contract(s) with Fuller-Austin *after* confirmation of Fuller-Austin's Bankruptcy Plan on November 13, 1998?

Check "Breached" or "Did Not Breach" for each defendant below.

	Breached	Did Not Breach
Certain Underwriters at Lloyd's, London and Certain London Market Insurance Companies (General Coverage)	X	____
Certain Underwriters at Lloyd's, London and Certain London Market Insurance Companies (Cities Service Coverage)	X	____
Highlands Insurance Company	X	____
Stonewall Insurance Company (Policy No. 12173)	X	____
Stonewall Insurance Company (Olin Policy)	____	X

Question No. 6:

It is Fuller-Austin's burden to prove by a preponderance of the evidence the answer to the following question.

QUESTION: As to any breach you found in Question No. 5 above, was that breach the cause of any damage to Fuller-Austin?

	Yes	No
Certain Underwriters at Lloyd's, London and Certain London Market Insurance Companies (General Coverage)	X	____
Certain Underwriters at Lloyd's, London and Certain London Market Insurance Companies (Cities Service Coverage)	X	____
Highlands Insurance Company	X	____

Stonewall Insurance Company (Policy No. 12173)	X	____
Stonewall Insurance Company (Olin Policy)	____	____

[Answer questions No. 7 and No. 8 only as to those defendants that you determined did *not* breach their duties *prior* to bankruptcy in Question No. 3 above and to which you found caused damages to Fuller-Austin in Question No. 4. If you found that all defendants breached their duties prior to bankruptcy in Question No. 3, that caused damages in Question No. 4, please skip questions No. 7 and No. 8.][1]

Question No. 7:

It is defendants' burden to prove by a preponderance of the evidence the answer to the following question.

QUESTION: Did Fuller-Austin breach its duty to cooperate with any of the defendants by filing its Bankruptcy Plan?

---

[1] The Court noted an error in the parenthetical preceding Questions 7 & 8, as a result of an inquiry by the jury. To address the error, the Court made the following revision to this parenthetical:

"Answer Questions 7 And 8 only as to those defendants that you determine did not breach their duty prior to bankruptcy in Question 3 above. If you find that all defendants breached their duty prior to bankruptcy in question 3, please skip question 7 and 8. If you find that any defendant breached its duty prior to bankruptcy in question 3, skip Questions 7 and 8 as to that defendant. Please note that questions 7 and 8 relate to the cooperation defense instruction which is found at the bottom of page 21 of your instructions."

Check "Fuller-Austin Breached" or "Fuller-Austin did Not Breach" as to each defendant below.

	Breached	Did Not Breach
Certain Underwriters at Lloyd's, London and Certain London Market Insurance Companies	____	X
Highlands Insurance Company	____	X
Stonewall Insurance Company	____	X

Question No. 8:

It is defendants' burden to prove by a preponderance of the evidence the answer to the following question.

QUESTION: If you found that Fuller-Austin breached its duty to cooperate with any of the defendants by filing its Bankruptcy Plan, were any of the defendants substantially prejudiced as a result of such breach?

Check "Substantially Prejudiced" or "Not Substantially Prejudiced" for each defendant below.

	Substantially Prejudiced	Not Substantially Prejudiced
Certain Underwriters at Lloyd's, London and Certain London Market Insurance Companies	____	____
Highlands Insurance Company	____	____
Stonewall Insurance Company	____	____

Question No. 9:

It is defendants' burden to prove by a preponderance of the evidence the answer to the following question.

QUESTION: Was Fuller-Austin's Bankruptcy Plan the product of collusion as to any of the defendants?

Check "Collusion" or "No Collusion" for each defendant below.

	Collusion	No Collusion
Certain Underwriters at Lloyd's, London and Certain London Market Insurance Companies	___	X
Highlands Insurance Company	___	X
Stonewall Insurance Company	___	X

Question No. 10:

It is defendants' burden to prove by a preponderance of the evidence the answer to the following question.

QUESTION: Was Fuller-Austin's Bankruptcy Plan the product of "unclean hands" as to any of the defendants?

Check "Yes" or "No" for each defendant below.

	Yes	No
Certain Underwriters at Lloyd's, London and Certain London Market Insurance Companies	___	X

Highlands Insurance Company	___	X
Stonewall Insurance Company	___	X

Question No. 11:

It is Fuller-Austin's burden to prove by a preponderance of the evidence the answer to the following question.

QUESTION: What is the value of the asbestos claims that the Fuller-Austin Trust has allowed as of January 31, 2003?

$ 108,175,000
Dollar Amount

Question No. 12a:

It is Fuller-Austin's burden to prove by a preponderance of the evidence the answer to the following question.

QUESTION: Can the amount of Fuller-Austin's present liability for pending but not yet resolved asbestos claims be reasonably estimated?

Check "Yes" or "No"

Yes	No
X	___

[If you answer "Yes," to Question No. 12a, answer Question No. 12b. If you [sic] answer is no to Question No. 12a, skip question 12b and answer Question No. 13a].

Question No. 12b:

QUESTION: If your answer to 12a is "Yes," what is the amount of Fuller-Austin's present liability for pending but not yet resolved asbestos claims?

$ 108,000,000
Dollar Amount

Question No. 13a:

It is Fuller-Austin's burden to prove by a preponderance of the evidence the answer to the following question.

QUESTION: Can the amount of Fuller-Austin's liability for future asbestos claims be reasonably estimated?

Check "Yes" or "No"

Yes	No
X	

[If you answered "Yes" to Question No. 13a, answer Question No. 13b. If you answered "No" to Question 13a, skip Question 13b and answer Question No. 14.]

Question No. 13b:

It is Fuller-Austin's burden to prove by a preponderance of the evidence the answer to the following question.

QUESTION: If your answer to 13a is "Yes," what is the amount of Fuller-Austin's future liability for asbestos claims?

$ 750,000,000
Dollar Amount

Question No. 14:

[The total of the amounts that you have found in 11, 12b and 13b, if any, are presumed to arise from exposure to Fuller-Austin products prior to 1975. It is defendants' burden to prove otherwise.]

QUESTION: What amount in 11, 12b and 13b, if any, is attributable to pre-1975 exposure to Fuller-Austin products?

$ 757,000,000
Dollar Amount

Question No. 15:

[The total of the amounts you found in Question Nos. 11, 12b, and 13b, if any, are presumed to arise from exposure to Fuller-Austin products during the policy periods. It is the defendants' burden to prove otherwise.]

QUESTION: What is the cumulative amount of Fuller-Austin's present liability, if any, for allowed, pending and future asbestos claims that can be allocated to the particular time periods set forth below based on exposure to Fuller-Austin asbestos?

From First Exposure Through		Dollar Amount
a.	12/31/74	$ 757,000,000
b.	12/31/75	$ 793,000,000
c.	01/31/77	$ 880,000,000
d.	03/02/78	$ 916,000,000
e.	02/01/79	$ 966,175,000
f.	07/01/79	$ 966,175,000
g.	07/01/80	$ 966,175,000

h.	07/01/81	$ 966,175,000
I.	07/01/82	$ 966,175,000
j.	07/01/83	$ 966,175,000
k.	07/01/84	$ 966,175,000
l.	07/01/85	$ 966,175,000

Question No. 16:

It is Fuller-Austin's burden to prove by a preponderance of the evidence the answer to the following question.

QUESTION: Can Fuller-Austin's present liability for pending and future asbestos claims covered by the Cities Service policies issued by the London Market Insurers be reasonably estimated?

Check "Yes" or "No"

Yes	No
X	

[If you answered "Yes," please answer Question No. 16b. If you answered "No," to Question No. 16a, skip Question No. 16b.]

Question No. 16b:

It is Fuller-Austin's burden to prove by a preponderance of the evidence the answer to the following question.

QUESTION: Does Fuller-Austin's present liability for pending and future asbestos claims covered by the Cities Service policies issued by the London Market Insurers, if any, exceed $20,214,800?

Check "Yes" or "No"

Yes	No
	X

[If you answered "Yes," to Question No. 16b, skip Question No. 17. If you answered "No," please answer Question No. 17.]

Question No. 17:[6]

It is Fuller-Austin's burden to prove by a preponderance of the evidence the answer to the following question.

> QUESTION: What is the cumulative amount of Fuller-Austin's present liability for pending and future asbestos claims that can be allocated to the Cities Service policies for the time periods set forth below based on exposure to Fuller-Austin asbestos?

From The 05/01/66 Inception Of The Cities Service Policies Through		Dollar Amount
a.	05/01/67	$ 2,416,927
b.	05/01/68	$ 5,167,225
c.	05/01/69	$ 8,084,208
d.	05/01/70	$ 12,209,654
e.	06/01/71	$ 17,585,238

[6] In entering judgment against the presently solvent Certain Underwriters at Lloyd's London and presently solvent Certain London Market Insurance Companies under the Cities Service policies, the Court below adjusted the amounts set forth by the jury so as to conform to the Court's rulings on allocation.

Question No. 18:

It is Fuller-Austin's burden to prove by a preponderance of the evidence the answer to the following question.

QUESTION: Does Fuller-Austin's present liability for pending and future asbestos claims covered by Stonewall Insurance Company policy D-11366 (the Olin Policy) exceed $3,000,000?

Check "Yes" or "No"

Yes	No
____	X

[If you answered "Yes," to Question No. 18, skip Question No. 19. If you answered "No," please answer Question No. 19.]

Question No. 19:

QUESTION: If you determined in Question No. 18 that Fuller-Austin did not prove its liability exceeded $3,000,000 for Olin claims, how much of Fuller-Austin's liability, if any, can be allocated to the Olin policy period?

Olin Policy Period	Dollar Amount
01/03/73-01/24/73	$ 536,506

Question No. 20:

It is Fuller-Austin's burden to prove by a preponderance of the evidence the answer to the following question.

QUESTION: How much do you determine each of the defendants should pay to the Fuller-Austin Trust, if anything, to cover its present liability for allowed, pending and future asbestos claims?

	Dollar Amount
Certain Underwriters at Lloyd's, London and Certain London Market Insurance Companies (General Coverage)	$ 63,271,270
Certain Underwriters at Lloyd's, London and Certain London Market Insurance Companies (Cities Service Coverage)	$ 17,585,238
Highlands Insurance Company	$ 57,400,000
Stonewall Insurance Company (Policy No. 12173)	$ 50,000,000
Stonewall Insurance Company (Olin Policy)	$ 536,506

Amended Question No. 21

It is defendants' burden to prove by a preponderance of the evidence the answer to the following question:

QUESTION: With respect to any of the defendants, has Fuller-Austin failed to mitigate any of its loss?

Check "Yes" or "No"

Yes	No
____	X

[If you answered "Yes" please answer Question No. 22. If you answered "No" please sign and date the verdict.]

Amended Question No. 22:

It is defendants' burden to prove by a preponderance of the evidence the answer to the following question:

> QUESTION: State the amount of Fuller-Austin's loss, reduced by that amount of loss that Fuller-Austin could have avoided through reasonable efforts.

General Coverage:
(Questions Nos. 14 or 15)

- Certain Underwriters at Lloyd's, London and Certain London Market Insurance Companies $ _____
- Highlands Insurance Company $ _____
- Stonewall Insurance Company (Policy No. 12173) $ _____

Cities Service Coverage:
(Questions Nos. 16b or 17)

- Certain Underwriters at Lloyd's, London and Certain London Market Insurance Companies $ _____

Olin Coverage:
(Questions Nos. 18 or 19) $ _____

- Stonewall Insurance Company $_____

Please date and sign the verdict."

Therefore, on and in conformity with the Phase IA Statement of Decision, the Phase IB Statement of Decision, the Special Verdict of the jury in the Phase II trial, and the Court's determination on allocation of liability and damages, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

1. The Court hereby enters judgment in favor of Fuller-Austin and against Columbia Casualty Company and Transcontinental Insurance Company as set forth in the separate judgment filed concurrently herewith.

2. The Court hereby enters judgment in favor of Fuller-Austin and against First State Insurance Company, New England Reinsurance Corporation, and Twin City Fire Insurance Company as set forth in the separate judgment filed concurrently herewith.

3. The Court hereby enters judgment in favor of Fuller-Austin and against International Insurance Company as set forth in the separate judgment filed concurrently herewith.

4. The Court hereby enters judgment in favor of Fuller-Austin and against the remaining defendants, the presently solvent Certain Underwriters at Lloyd's London and presently solvent Certain London Market Insurance Companies, Highlands Insurance Company, and Stonewall Insurance Company severally, but not jointly, in the amounts specifically set forth in paragraphs 4(a)(i)-(xi), 4(b)(i)-(xi), 4(c)(i), and 4(d) below.

With respect to the allocation of the damages found by the jury to the remaining policies at issue, the Court deems that portion of the Special Verdict as advisory. The Court, based on its legal determinations as to allocation and upon the jury's findings, hereby orders payment by the following insurance company and underwriter defendants under the following insurance policies in the following amounts:

a. The presently solvent Certain Underwriters at Lloyd's London and presently solvent Certain London Market Insurance Companies hereby are severally, but not jointly, adjudged and ordered to pay Fuller-Austin the amount of $79,562,678 broken down by policy as follows:

Cities Service Policies

i. Policy No. CU 6499/CL 97099 for the policy period May 1, 1966 to May 1, 1967 in the amount of $2,416,927.

ii. Policy No. CU 8118/CL 98708 (L-188268, C-188268) for the policy period May 1, 1967 to May 1, 1968 in the amount of $2,750,298.

iii. Policy No. CU 10215/CL 100277 (L-194482, C-194482) and Policy No. CU 10216/CL 100284 (L-194490, C-194490) for the policy period May 1, 1968 to May 1, 1969 in the amount of $2,916,983.

iv. Policy No. CU 10215/CL 100277 (L-194482, C-194482) and Policy No. CU 10216/CL 100284 (L-194490, C-194490) for the policy period May 1, 1969 to May 1, 1970 in the amount of $4,103,600.

v. Policy No. CU 10215/CL 100277 (L-194482, C-194482) and Policy No. CU 10216/CL 100284 (L-194490, C-194490) for the policy period May 1, 1970 to May 1, 1971 in the amount of $4,103,600.

General Policies

vi. Policy No. 53086 for the policy period January 1, 1976 to January 31, 1977 in the amount of $10,000,000.

vii. Policy No. 53386/62474 for the policy period January 31, 1977 to March 2, 1978 in the amount of $4,993,907.

viii. Policy No. 53658/62739 for the policy period March 2, 1978 to February 1, 1979 in the amount of $4,487,683.

ix. Policy No. 53930/62955 for the policy periods February 1, 1979 to July 1, 1979 in the amount of $17,559,465.

x. Policy No. 53930/62955 for the policy periods July 1, 1979 to July 1, 1980 in the amount of $17,559,465.

xi. Policy No. 54362/63289 for the policy period July 1, 1980 to July 1, 1981 in the amount of $8,670,750.

b. Highlands Insurance Company hereby is adjudged and ordered to pay Fuller-Austin the amount of $57,400,000 broken down by policy as follows:

i. Highlands Insurance Company Policy No. 20550 for the policy period March 15, 1978 through February 1, 1979 in the amount of $3,400,000.

ii. Highlands Insurance Company Policy No. 20556 for the policy period March 15, 1978 through February 1, 1979 in the amount of $2,000,000.

iii. Highlands Insurance Company Policy No. 20792 for the policy period February 1, 1979 through July 1, 1980 in the amount of $6,000,000.

iv. Highlands Insurance Company Policy No. 21089 for the policy period July 1, 1980 through July 1, 1981 in the amount of $3,000,000.

v. Highlands Insurance Company Policy No. 21090 for the policy period July 1, 1980 through July 1, 1981 in the amount of $5,000,000.

vi. Highlands Insurance Company Policy No. 21279 for the policy period July 1, 1981 through July 1, 1982 in the amount of $3,000,000.

vii. Highlands Insurance Company Policy No. 21280 for the policy period July 1, 1981 through July 1, 1982 in the amount of $5,000,000.

viii. Highlands Insurance Company Policy No. 21524 for the policy period July 1, 1982 through July 1, 1983 in the amount of $3,000,000.

ix. Highlands Insurance Company Policy No. 21525 for the policy period July 1, 1982 through July 1, 1983 in the amount of $7,000,000.

x. Highlands Insurance Company Policy No. 21833 for the policy period July 1, 1983 through July 1, 1984 in the amount of $10,000,000.

xi. Highlands Insurance Company Policy No. 22207 for the policy period July 1, 1984 through July 1, 1985 in the amount of $10,000,000.

c. Stonewall Insurance Company hereby is adjudged and ordered to pay Fuller-Austin the amount of $50,000,000, broken down by policy as follows:

i. Stonewall Insurance Company Policy No. 12173 for the policy period December 31, 1973 to December 31, 1975 in the amount of $50,000,000.

d. Further, the Court hereby declares that there are covered claims under Stonewall Insurance Company Policy No. D11366 for the policy period January 3, 1973 to January 24, 1973 in the amount of $536,506, and the Court hereby declares that Stonewall Insurance Company is liable to Fuller-Austin in the amount of $536,506 under Policy No. D11366.

5. Pre-Judgment Interest. The Court hereby awards pre-judgment interest at the rate of 7% per annum from the date of the jury verdict, May 5, 2003, to the date of the entry of this judgment. The presently solvent Certain Underwriters at Lloyd's London and presently solvent Certain London Market Insurance Companies, Highlands Insurance Company, and Stonewall Insurance Company are liable for interest on their respective portions of the judgment as set forth in paragraphs 4(a)(i)-(xi), 4(b)(i)-(xi), 4(c)(i), and 4(d) above, as follows:

a. With respect to the General Coverage issued by those solvent Underwriters at Lloyd's and the solvent London Market Insurance Companies that subscribed severally to the insurance policies at issue in this litigation, prejudgment interest on $63,271,270 for the period May 5, 2003 through July 31, 2003 (88 days) in the amount of $1,067,386.

b. With respect to the Cities Service coverage issued by those solvent Underwriters at Lloyd's and the solvent London Market Insurance Companies that subscribed severally to the insurance policies at issue in this litigation, prejudgment interest on $16,291,408 for the period May 5, 2003 through July 31, 2003 (88 days) in the amount of $274,836.

c. -With respect to Highlands general coverage prejudgment interest on $57,400,000 for the period May 5, 2003 through July 31, 2003 (88 days) in the amount of $968,338.

d. With respect to Stonewall general coverage prejudgment interest on $50,000,000 for the period May 5, 2003 through July 31, 2003 (88 days) in the amount of $843,500.

6. Post-Judgment Interest. This judgment shall bear interest at 10% per annum from the date of entry of this judgment until paid. The presently solvent Certain Underwriters at Lloyd's London and presently solvent Certain London Market Insurance Companies, Highlands Insurance Company, and Stonewall Insurance Company, severally, but not jointly, shall be liable for the interest accumulated on their respective portion of the judgment.

7. Costs are to be awarded to Fuller-Austin as the prevailing party, and are to be determined pursuant to Fuller-Austin's cost statement to be filed with this Court and any motions to tax.

8. This judgment resolves all issues between Fuller-Austin and Certain Underwriters at Lloyd's, London and Certain London Market Insurance Companies, Highlands Insurance Company, and Stonewall Insurance Company. Except as set forth in this judgment, no party is entitled to relief against any other party under the parties' pleadings herein.

9. This Court shall retain jurisdiction over this action to the extent necessary to ensure full compliance with all prior rulings, orders, declarations, judgments, and decrees and the obligations imposed by this Final Judgment and for the purpose of enabling any of the parties to apply to this Court at any time for such further orders or direction as may be necessary or appropriate for the interpretation or implementation hereof, the enforcement hereof, compliance herewith, or the punishment of violations hereof.

IT IS SO ORDERED AND ADJUDGED.

Dated: August 1, 2003 /s/ Judith C. Chirlin
Honorable Judith C. Chirlin
Judge of the Superior Court

Supreme Court, U.S.
FILED
JUL 18 2006
OFFICE OF THE CLERK

No. 06-06-94

In The
Supreme Court of the United States

FULLER-AUSTIN INSULATION COMPANY, f/b/o FULLER-AUSTIN ASBESTOS SETTLEMENT TRUST,

Petitioner,

v.

HIGHLANDS INSURANCE COMPANY, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The California Court Of Appeal, Second Appellate District, Division Two

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI VOLUME II, Pages 122 to 340

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

FULLER-AUSTIN INSULATION COMPANY, *Plaintiff,* vs. FIREMAN'S FUND INSURANCE COMPANY, *et al.*, *Defendants.*	CASE NO. BC 116835 The Honorable Judith C. Chirlin Dept. 89 REVISED STATEMENT OF DECISION AS TO PHASE IA, ISSUES 1 AND 8 (Filed Jul. 31, 2003)

I. INTRODUCTION

Fuller-Austin Insulation Company brought this declaratory relief action to determine the obligations of its insurers, under various comprehensive general liability, umbrella and excess policies issued between 1944 and 1985, for claims against Fuller-Austin alleging bodily injury arising out of the exposure to asbestos-containing products installed or removed by Fuller-Austin.

This action originally included as defendants the solvent insurance companies which issued primary, umbrella and excess policies to either Fuller-Austin Insulation Company or Dynalectron (later known as DynCorp). During the course of this action, Fuller-Austin settled its insurance disputes with all the primary carriers it had sued and some of the umbrella carriers. Those parties were dismissed from this lawsuit once the U.S. District Court in Wilmington, Delaware, acting as the bankruptcy court overseeing the Fuller-Austin bankruptcy, approved each settlement. The remaining defendants are as follows: The American Insurance Company

(erroneously named as Fireman's Fund Insurance Company), Chicago Insurance Company, Columbia Casualty Company, Federal Insurance Company, First State Insurance Company, Highlands Insurance Company, The Home Insurance Company, International Insurance Company, London Market Insurers, New England Reinsurance Corporation, Stonewall Insurance Company, Twin City Insurance Company and Transcontinental Insurance Company.

A. Order Of Trial.

The Court ordered that Phase I of the trial consist of nine legal issues for the Court's determination. Trial of legal Issues #1-#9 was first recommended by Judge Frederick Lower, (see Exhibit K attached hereto), and adopted by the Court on December 1, 2000. Because these issues are either pure questions of law or are interpretations of insurance contracts, a jury is not warranted. *Parsons v. Bristol Development Co.*, 62 Cal.2d 861, 865 (1965). The nine issues are:

1. The resolution of disputes, if any, relevant to the issues of Phase I concerning (a) the content of policies; (b) the policy periods; (c) the incorporation of lower level policy language into upper level policies, i.e. what language in lower level policies is relevant and what language is to be incorporated? Any issues of limits of liability are to be reserved for Phase II.

2. What is the legal effect of policy language that requires the underlying carrier to "have paid or have been held legally liable to pay the full amount of their respective limits of liability" before an excess carrier's obligation arises?

(a) Is actual payment in cash, in full, or at all, required before an excess carrier's obligations are triggered?

(b) Does payment of underlying limits to the insured rather than to third party claimants constitute exhaustion?

(c) Does installment payments of underlying limits to the insured constitute exhaustion?

(d) Does an underlying insurer's assertion of exhaustion, contested by the insured, constitute exhaustion?

(e) Does an insured's assertion that its underlying coverage has been exhausted establish the fact of exhaustion binding upon, its excess insurers?

3. Are any of the policies at issue here triggered if Fuller-Austin's "liabilities" exceed the policies' attachment points?

(a) What "liabilities" are to be considered?

(b) Are there critical dates for determining "liabilities?" If so, what are those dates?

4. Are there critical dates or events for determining if excess insurers' obligations have been triggered? If so, what re those dates or events?

5. Has exhaustion occurred as a matter of law because of the ruling in *Phoenix Ins. Co. v. U.S. Fire Ins. Co.* (1987) 189 Cal.App.3d 1511?

6. What is the legal effect of "drop down" provisions in "excess" policies or in "umbrella" policies?

7. What is the legal effect of insolvencies of underlying insurers?

8. What method of exhaustion is appropriate in this case; exhaustion of immediately underlying policies or exhaustion of all underlying insurance, in any years, i.e., horizontal or vertical exhaustion?

9. Under California and/or Louisiana law do the defendants' policies respond on a "continuous trigger" basis?

The Court further ordered that Phase IA of the trial would consist only of Issues #1 and #8 above and that Phase IB would consist of Issues #2 through #7 and #9. Phase IA commenced on December 4, 2000, and the parties rested on December 18, 2000. Closing arguments were held on May 14 and 15, 2001. Phase IA is the subject of this Statement of Decision.

B. Choice Of Law.

In earlier motions, the Court ruled that Louisiana law applies to the so-called Cities Services policies. Otherwise, the Court will apply California law to the interpretation of the policies.

C. Evidentiary And Procedural Stipulations Re: Phase IA.

Policy Stipulations: Trial Exhibits 1 through 110 are copies of the insurance policies including those issued by the excess insurers remaining in the case, those issued by insolvent insurers not in the case, and policies or policy-related documentation of primary and excess carriers who have settled before trial. The parties stipulated that they

would not object to the introduction at trial of Exhibits 1-110, the policies, all as are more fully listed in the Stipulation Regarding Insurance Policies signed by the parties during Phase IA.

The General or "First Wave" Document Stipulations #1-4 were pretrial agreements wherein Fuller-Austin waived certain evidentiary objections to four categories of documents produced as a result of defendants' Motions to Compel filed in 1999. These four stipulations were signed by the parties during Phase IA and are part of the Court's file.

A Procedural Stipulation for Phase IA arose out of a discussion held on the record on December 4, 2000, the first day of trial, concerning the purpose and admissibility of certain evidence sought to be introduced by plaintiff in Phase IA and the defendants' response to that proffer. This stipulation was adopted because the parties had different views of the relevancy and proper scope of Phase IA evidence. The Phase IA Procedural Stipulation adopted by the Court is part of the file in this action.

On March 14, 2001, a binding "Stipulation and Order Between Fuller-Austin and Highlands Insurance Company re 'Incorporation' Issues" (hereinafter "Fuller-Austin & Highlands Stipulation") was agreed upon by the aforementioned parties and ordered by this Court. Pursuant to the Fuller-Austin & Highlands Stipulation, several incorporation issues between the parties were resolved and set forth in the Stipulation. This Fuller-Austin & Highlands Stipulation is also part of the file in this action.

II. ISSUE #1 – INCORPORATION DISPUTES

A. Overview of Dispute.

The parties dispute whether certain provisions of the umbrella and underlying excess policies have been incorporated into the excess policies in the Fuller-Austin insurance program. The incorporation disputes in Phase IA arise from several basic circumstances. Many of the excess policies purport to incorporate underlying provisions from several different policies; these policies purportedly "follow form" of the underlying umbrella or excess policies. In many instances, the excess policies sit above layers of coverage shared by two or more underlying insurers. Thus, an area of dispute arises when the excess policy purports to incorporate provisions from multiple underlying policies, each of which also incorporates terms from other underlying policies. Further, the parties dispute whether only particular portions (e.g. sentences and words) of an underlying policy provision can be incorporated when the policy language to be incorporated from the underlying policies is inconsistent with the policy language contained in the excess policy at issue.

Fuller-Austin asserts that the aforementioned circumstances create ambiguities and inconsistencies, which should be construed against the insurance companies and, accordingly, resolved in favor of coverage for the insured. *See Rummel v. St. Paul Surplus Lines*, 123 N.M. 767 (1997). For example, Fuller-Austin suggests that, where the "following form" excess policy addresses a specific issue, it cannot incorporate language from an underlying policy that is more restrictive on the same issue. It argues that such a restriction would be inconsistent with the broader provision provided for in the excess policy.

In contrast, Joint Defendants argue that incorporation is not designed to expand or to limit coverage but rather to ensure that coverage between the underlying and excess policy remains uniform and seamless. Consequently, they assert, any doubts regarding incorporation should be resolved in favor of incorporation regardless of whether the incorporated clause expands or limits coverage.

B. Applicable Rules of Incorporation Analysis.

Excess insurance is designed to provide additional limits for the same type of coverage provided to an insured by primary or lower level policies. Absent specific policy language, it usually does not broaden the underlying coverage. *Wells Fargo Bank v. California Ins. Guarantee Ass'n*, 38 Cal.App.4th 936, 940, n.2 (1995).

To ensure uniformity of coverage throughout the layers of primary and excess coverage, the typical excess policy does not have a stand alone grant of coverage clause. Instead, the excess policy "follows form" or "incorporates" language from lower level policies to provide a complete grant of coverage. The clause in an excess policy which incorporates terms and conditions from a lower level policy is often referred to as a "following form" clause. Such a clause is generally designed to facilitate continuity and consistency in the layers of coverage purchased by the insured. "Following form gives the insured more uniform coverage and facilitates spreading risks among insurers." *Shell Oil Co. v. Winterthur Swiss Ins. Co.* 12 Cal.App.4th 715, 735 (1993). Incorporated provisions effectively become part of the following form excess policies, with the result that "[i]n a following form policy 'the excess has the same scope of coverage as the primary policy." *Wells Fargo*

Bank, supra, 38 Cal.App.4th at 941, n.4; *Coca Cola Bottling Co. v. Columbia Casualty Ins. Co.* 11 Cal.App.4th 1176, 1182-83 (1992).

Policies which "follow form" "are typically written on the same terms and conditions as the coverage provided by the underlying primary coverage. They are generally short, consisting of one or two pages, with an endorsement or provision that incorporates by reference the underlying policy coverages, except for the premium, the liability limits, and the obligation to investigate, defend, or pay costs of defense." *Coca Cola Bottling Co., supra*, 11 Cal.App.4th at p. 1183.

In determining the extent to which an excess policy incorporates terms and provisions from an underlying policy, the Court must examine all parts of these contracts together and give effect to every part, if reasonably practicable, each clause helping to interpret the other. *California Civil Code Section 1641*. Since the purpose of an excess insurance policy is to provide additional limits for the scope of coverage provided by lower level policies, the Court must look at the upper level excess and lower level underlying policies together, reading all as one contract to the extent possible, as the incorporated provisions from the underlying policies effectively become part of the excess policy. *California Civil Code Section 1642*; *Coca Cola Bottling Co., supra*, 11 Cal.App.4th at. p. 1183.

C. Rulings On Issue #1.

In resolving the incorporation issues raised by the parties, the Court has interpreted the relevant policy language by harmonizing the clauses in the various excess and underlying policies to ensure that the scope of coverage

afforded by the excess policies is consistent with that afforded by the lower level policies. The Court has not invoked the doctrine of "Burden of Proof" nor accepted any construction of policy language advanced by Fuller-Austin simply by reason of its status as an insured. In order to ensure uniformity of coverage between the policies issued by each of the Joint Defendants with the lower level policies purchased by Fuller-Austin, the Court adopts the following principles in ruling on the specific incorporation issues tried during Phase IA, as discussed more fully below:

1. The Court's rulings promote consistency of coverage throughout all layers of coverage in a given year.

2. Each of the Joint Defendants' policies (other than London policies bearing policy number CU 6499, CU 8118 and CU 10215, which are "stand alone" policies providing coverage for the period May 1, 1966, through June 1, 1971) "follows form" to an underlying policy or policies.

3. When an excess policy "follows form" to an underlying policy, incorporation of the underlying policy's provisions is the norm, with non-incorporation being the exception.

4. The excess policy and the underlying policy or policies it draws upon, must be read together and interpreted, if possible, in a manner which gives effect to all relevant provisions of both policies, excepting only those which are expressly excluded from incorporation or cannot be harmonized in whole or in part.

5. The fact that an excess and an underlying policy contain identical or similar subject matter headings, in

and of itself, does not preclude incorporation of underlying provisions beneath those headings.

6. The fact that provisions in an underlying policy deal with same or similar issues as are dealt with by provisions in an excess policy, in and of itself, does not preclude incorporation of that underlying provision.

7. The fact that an excess policy and an underlying policy contain language which is similar but not identical, in and of itself, does not preclude incorporation of such language from the underlying policy.

8. The fact that a clause or sentence(s) in an underlying policy provision is expressly excluded from incorporation, in and of itself, does not exclude the remainder of the underlying provision from incorporation.

9. The fact that a portion of a provision in an underlying policy is found to be inconsistent or otherwise excluded from incorporation, in and of itself, does not exclude the remainder of the provision from incorporation.

10. The fact that there is a dispute as to which underlying policy or policies an excess policy draws upon does not *ipso facto* create an ambiguity which either precludes incorporation or permits Fuller-Austin to choose which underlying policy provision is included.

Applying the foregoing principles, the Court has made particular findings concerning the disputed provisions for each policy at issue:

a. Highlands Insurance Company

The Court adopts the Stipulation between Highlands and Fuller-Austin.

b. The American Insurance Company

A. The American Insurance Company ("the American") issued a Following Form Blanket Excess Liability Policy, policy number XLX 136 22 92, to Dynalectron Corporation for the policy period from February 1, 1979 to July 1, 1980 (the "American Policy"). *Trial Exhibit 20, American Insurance Policy No. XLX 136 22 92.*

B. Holland-America Insurance Company issued an umbrella policy, policy number H882602, to Dynalectron Corporation for the policy period of February 1, 1979 to July 1, 1980 (the "Holland-America Policy"). The Holland-America Policy, *Trial Exhibit 34, Holland-America Policy No. H88260,* is one of the policies underlying the American Policy.

C. Except as identified below, Fuller-Austin has no other disputes regarding whether a particular provision is incorporated into the American Policy from any policy underlying the American Policy. *Trial Exhibit 20, American Insurance Policy No. XLX 136 22 92.*

D. As to the controverted issues relating to the American Policy, the Court rules as follows:

(a) The Holland-America Policy No. H88260's *(Trial Exhibit 34)* "Loss Payable" provision is not incorporated into the American Policy XLX 136 22 92. It states:

> Liability under this policy with respect to any occurrence shall not attach unless and until the Assured, or the Assured's underlying insurer, shall have paid the amount of the underlying limits on account of such occurrence . . . *Trial Exhibit 34, Holland-America Policy No. H88260, Conditions, ¶ J.*

However, the balance of the Holland-America "Loss Payable" provision *(Trial Exhibit 34)* is incorporated into the American Policy XLX 136 22 92. It states:

> The Assured shall make a definite claim for any loss for which the Underwriters may be liable under the policy within twelve (12) months after the Assured shall have paid an amount of ultimate net loss in excess of the amount borne by the Assured or after the Assured's liability shall have been fixed and rendered certain either by final judgment against the Assured after actual trial or by written agreement of the Assured, the claimant, and Underwriters. If any subsequent payment shall be made by the Assured on account of the same occurrence, additional claims shall be made similarly from time to time. Such losses shall be due and payable within thirty (30) days after they are respectively claimed and proven in conformity with this policy. *Trial Exhibit 34, Holland-America Policy No. H88260, Conditions, ¶ J.*

(b) The Holland-America Policy's "Prior Insurance and Non-Cumulation of Liability" provision *(Trial Exhibit 34)* is incorporated into the American Policy XLX 136 22 92. It provides:

> It is agreed that if any loss covered hereunder is also covered in whole or in part under any other excess policy issued to the Assured prior to the inception date hereof the limit of liability hereon as stated in Item [2] of the Declarations shall be reduced by any amounts due to the Assured on account of such loss under such prior insurance. *Trial Exhibit 34, Holland-America Policy No. H88260, Conditions, ¶ C.*

c. Chicago Insurance Company

A. The Chicago Insurance Company ("Chicago") has one policy at issue, policy number 255U-0037285, in effect from July 1, 1984 to July 1, 1985. The Chicago Policy is an excess policy that shares a third layer of excess coverage with one other policy. *Trial Exhibit 10, Chicago Insurance Policy 255U-0037285.*

B. The Chicago "incorporation" provision states:

> This Policy is subject to the same terms, definitions, exclusions and conditions (except as regards the premium, the amount and limits of liability and except as otherwise provided herein) as are contained in or as may be added to the Underlying [Umbrella] Policies stated in Item [ ] of the Declarations prior to the happening of an occurrence for which claim is made hereunder. *Trial Exhibit 10, Chicago Insurance Policy 255U-0037285, Maintenance of Underlying Umbrella Insurance.*

C. Except as identified in paragraph D below, Fuller-Austin has no other disputes regarding whether a particular provision is incorporated into the Chicago Policy from any policy underlying the Chicago Policy.

D. As to the controverted issues relating to incorporation/following form, the Court rules as follows:

(b) The first sentence of the Mission National Umbrella Policy #MN 034643 "Loss Payable" provision *(Trial Exhibit 72)* is not incorporated into the Chicago Policy 255U-0037285 *(Trial Exhibit 10)*. It states:

> Liability under this policy with respect to any occurrence shall not attach unless and until the Insured, or the Insured's underlying insurer, shall

> have paid the amount of the underlying limits on account of such occurrence. *Trial Exhibit 72, Mission National Umbrella Policy, #MN 034643, Conditions, ¶ H.*

However, the balance of the Mission National Umbrella Policy # MN 034643's "Loss Payable" provision (*Trial Exhibit 72*) is incorporated into the Chicago Policy 255U-0037285 *(Trial Exhibit 10)*. It states:

> The Assured shall make a definite claim for any loss for which the Underwriters may be liable under the policy within twelve (12) months after the Assured shall have paid an amount of ultimate net loss in excess of the amount borne by the Assured or after the Assured's liability shall have been fixed and rendered certain either by final judgment against the Assured after actual trial or by written agreement of the Assured, the claimant, and Underwriters. If any subsequent payment shall be made by the Assured on account of the same occurrence, additional claims shall be made similarly from time to time. Such losses shall be due and payable within thirty (30) days after they are respectively claimed and proven in conformity with this policy. *Trial Exhibit 72, Mission National Umbrella Policy # MN 034643, Conditions, ¶ H.*

d. CNA Insurance Company

A. The CNA companies have five policies at issue, consisting of one umbrella policy and four excess policies. They are:

Carrier/Type	Policy Num.	Policy Period	Ex. Num.
Columbia Casualty (Umbrella policy)	RDU 36 52 80	2/14/77 2/1/78	11
Columbia Casualty (Excess policy)	RDX 417 02 36	7/1/8 1 to 7/1//82	12
Transcontinental (Excess policy)	RDX 009 61 65 53	7/1/82 to 7/1/83	89
Transcontinental (Excess policy)	RDX 009 61 65 77	7/1/83 to 7/1/84	90
Transcontinental (Excess policy)	RDX 009 61 67 05	7/1/84 to 7/1/85	91

B. The CNA "incorporation" provision in the umbrella policy states:

> The company will indemnify the insured for loss in excess of the total applicable limits of liability of underlying insurance stated in the schedule. The provisions of the immediate underlying policy are, with respect to Coverage A, incorporated as a part of this policy except for any obligation to investigate and defend and pay for costs and expenses, incident to any of the same, the amounts of the limits of liability, an 'other insurance' provision and any other provisions therein which are inconsistent with this policy. *Trial Exhibit 11, Columbia Casualty Umbrella Policy RDU 36 52 80, Coverage, ¶ 1 "Coverage A – Excess Liability Indemnity."*

C. The CNA definition of "immediate underlying policy" in the umbrella policy is:

> . . . the policy of the underlying insurance which provides the layer of coverage, whether primary or excess, immediately proceeding the layer of coverage . . . *Trial Exhibit 11, Columbia Casualty Umbrella Policy RDU 36 52 80, Definitions, "immediate underlying insurance."*

D. The CNA "incorporation" provisions of all the excess policies state:

> The provisions of the immediate underlying policy are incorporated as a part of this policy except for any obligation to investigate and defend and pay for costs and expenses incident to the same, the amount of the limits of liability, any 'other insurance' provision and any other provisions therein which are inconsistent with the provisions of this policy. *Trial Exhibit 12, Columbia Casualty Excess Policy RDX 417 02 36, Part I – Insuring Agreement, "1. Excess Liability Indemnity;" Trial Exhibits 89, 90, and 91. Transcontinental Excess Policies RDX 009 61 65 53, RDX 009 61 65 77, and RDX 009 61 67 05, Part I – Insuring Agreement, "1. Excess Liability Indemnity."*

E. The CNA definition of "Immediate Underlying Policy" contained in the excess policies is:

> "Immediate underlying policy" means the policy of the underlying insurance which provides the layer of coverage, whether primary or excess, immediately preceding the layer of coverage provided by this policy. *Trial Exhibit 12, Columbia Casualty Excess Policy RDX 417 02 36, Part II – Definitions, "1. Immediate Underlying Policy,"*

Trial Exhibits 89, 90, and 91. Transcontinental Excess Policies RDX 009 61 65 53, RDX 009 61 65 77, and RDX 009 61 67 05, Part II – Definitions, "1. Immediate Underlying Policy."

F. No incorporation disputes exist regarding the CNA policies, except for those identified at Phase IA of Trial, as to which the Court makes the following rulings:

(a) "Loss Payable" Provisions

Columbia Casualty Excess Policy No. RDX 417 02 36 (*Trial Exhibit 12*) incorporates the Loss Payable provisions from the immediately underlying policies, Integrity Policy No. XL 203282 (*Trial Exhibit 42*); Lexington Insurance Company Policy No. 5522463 (*Trial Exhibit 54*), and Highlands Insurance Policy No. 21280 (*Trial Exhibit 28*). All these provisions state:

> The Insured shall make a definite claim for any loss for which the Company may be liable under the policy within twelve (12) months after the Insured shall have paid an amount of ultimate net loss in excess of the amount borne by the Insured or after the Insured's liability shall have been fixed and rendered certain either by final judgment against the Insured after actual trial or by written agreement of the Insured, the claimant, and the Company. If any subsequent payments shall be made by the Insured on account of the same occurrence, additional claims shall be made similarly from time to time. Such losses shall be due and payable within thirty (30) days after they are respectively claimed and proven in conformity with this policy. *Trial Exhibit 36, Holland-America Insurance Company, Policy H-93688, Conditions, ¶ J.*

Transcontinental Policy No. RDX 009 61 65 53 (*Trial Exhibit 89*) incorporates the Loss Payable provisions from the immediately underlying policies, Integrity Policy No. XL 206329 (*Trial Exhibit 43*); National Union Fire Insurance Company Policy 9600316 (*Trial Exhibit 79*), and Highlands Insurance Company Policy No. SR 21525 (*Trial Exhibit 30*). All these provisions state:

> The Insured shall make a definite claim for any loss for which the Company may be liable under the policy within twelve (12) months after the Insured shall have paid an amount of ultimate net loss in excess of the amount borne by the Insured or after the Insured's liability shall have been fixed and rendered certain either by final judgment against the Insured after actual trial or by written agreement of the Insured, the claimant, and the Company. If any subsequent payments shall be made by the Insured on account of the same occurrence, additional claims shall be made similarly from time to time. Such losses shall be due and payable within thirty (30) days after they are respectively claimed and proven in conformity with this policy. *Trial Exhibit 71, Mission National Umbrella Policy # MN 009859, Conditions, ¶ H*

Transcontinental Policy No. RDX 009 61 65 77 (*Trial Exhibit 90*) incorporates the Loss Payable provision from the immediately underlying policy, Highland Insurance Company Policy No. 21833 (*Trial Exhibit 31*). The provision states:

> The Insured shall make a definite claim for any loss for which the Company may be liable under the policy within twelve (12) months after the Insured shall have paid an amount of ultimate net loss in excess of the amount borne by the Insured

> or after the Insured's liability shall have been fixed and rendered certain either by final judgment against the Insured after actual trial or by written agreement of the Insured, the claimant, and the Company. If any subsequent payments shall be made by the Insured on account of the same occurrence, additional claims shall be made similarly from time to time. Such losses shall be due and payable within thirty (30) days after they are respectively claimed and proven in conformity with this policy. *Trial Exhibit 71, Mission National Umbrella Policy # MN 009859, Conditions, ¶ H.*

Transcontinental Policy No. RDX 009 61 67 05 (*Trial Exhibit 91*) incorporates the Loss Payable provisions from the immediate underlying policies, Chicago Insurance Company Policy 255U-0037285 (Trial Exhibit 10) and Highlands Insurance Company Policy No. 22207 *(Trial Exhibit 32)*. All these provisions state:

> The Insured shall make a definite claim for any loss for which the Company may be liable under the policy within twelve (12) months after the Insured shall have paid an amount of ultimate net loss in excess of the amount borne by the Insured or after the Insured's liability shall have been fixed and rendered certain either by final judgment against the Insured after actual trial or by written agreement of the Insured, the claimant, and the Company. If any subsequent payments shall be made by the Insured on account of the same occurrence, additional claims shall be made similarly from time to time. Such losses shall be due and payable within thirty (30) days after they are respectively claimed and proven in conformity with this policy. *Trial Exhibit 72, Mission National Umbrella Policy # MN 034643, Conditions, ¶ H.*

(b) *"Prior Insurance" Provisions*

Columbia Casualty Excess Policy No. RDX 417 02 36 (*Trial Exhibit 12*) incorporates the "Prior Insurance" provisions of the immediately underlying policies, Integrity Policy No. XL 203282 (*Trial Exhibit 42*); Lexington Insurance Company Policy No. 5522463 (*Trial Exhibit 54*), which, in turn, incorporate the provision from the Holland-America Insurance Policy H-93688 (*Trial Exhibit 36*). It states:

> It is agreed that if any loss covered hereunder is also covered in whole or in part under any other excess policy issued to the Insured prior to the inception date hereof the limit of liability hereon as stated in Item 2 of the Declarations shall be reduced by any amounts due to the Insured on account of such loss under such prior insurance. *Trial Exhibit 36, Holland-America Insurance Policy H-93688, "Prior Insurance and Non-Cumulation of Liability."*

Additionally, Columbia Casualty Excess Policy No. RDX 417 02 36 (*Trial Exhibit 12*) incorporates the "Prior Insurance" provisions from the immediately underlying Highlands Insurance Policy No. 21280 (*Trial Exhibit 28*). It states:

> It is agreed that if any loss covered hereunder is also covered in whole or in part under any other excess policy issued to the Insured prior to the inception date hereof the limit of liability hereon as stated in II B shall be reduced by any amounts due to the insured on account of such loss under such prior insurance. Subject to the foregoing and to all the other terms and conditions of this Policy in the event that personal injury or property damage arising out of an

> occurrence covered hereunder is continuing at the time of termination of this Policy, the Company will continue to protect the Insured for liability in respect of such personal injury or property damage without payment of additional premium. *Trial Exhibit 28, Highlands Insurance Company Policy No. SR 21280, Conditions, ¶ I.*

Transcontinental Policy No. RDX 009 61 65 53 (*Trial Exhibit 89*) incorporates the "Prior Insurance" provisions of the immediately underlying policies, Integrity Policy No. XL 206329 (*Trial Exhibit 43*) and National Union Fire Insurance Company Policy 9600316 (*Trial Exhibit 79*), which, in turn, incorporate the provision from the Mission-National Insurance Company Policy MN # 009859 (*Trial Exhibit 71*). The provision states:

> It is agreed that if any loss covered hereunder is also covered in whole or in part under any other excess policy issued to the Insured prior to the inception date hereof the limit of liability hereon as stated in Item 2 of the Declarations shall be reduced by any amounts due to the Insured on account of such loss under such prior insurance. *Trial Exhibit 71, Mission-National Insurance Policy MN # 009859, Conditions, ¶ C.*

Additionally, Transcontinental Policy No. RDX 009 61 65 53 (*Trial Exhibit 89*) incorporates the "Prior Insurance" provision from the immediately underlying Highlands Insurance Policy No. 21525 (*Trial Exhibit 30*). It states:

> It is agreed that if any loss covered hereunder is also covered in whole or in part under any other excess policy issued to the Insured prior to the inception date hereof the limit of liability hereon as stated in II B shall be reduced by an amounts

> due to the Insured on account of such loss under such prior insurance. Subject to the foregoing and to all the other terms and conditions of this Policy in the event that personal injury or property damage arising out of an occurrence covered hereunder is continuing at the time of termination of this Policy, the Company will continue to protect the Insured for liability in respect of such personal injury or property damage without payment of additional premium. *Trial Exhibit 30, Highlands Insurance Company Policy No. SR 21525, Conditions, ¶ I.*

Transcontinental Policy No. RDX 009 61 65 77 (*Trial Exhibit 90*) incorporates the "Prior Insurance" provision of the immediately underlying policy, Highlands Insurance Company Policy No. 21833 (*Trial Exhibit 31*), which, in turn, incorporates the "Prior Insurance" provisions of New England Insurance Company (Hartford) Policy 791331 (*Trial Exhibit 82*) and Mission-National Insurance Policy MN # 009859 (*Trial Exhibit 71*). The New England Insurance Company (Hartford) Policy 791331's prior insurance provision states:

> It is agreed that if any loss covered hereunder is also covered in whole or in part under any other excess policy issued to the Insured prior to the inception date hereof the limit of liability hereon as stated in Item 4 of the Declarations shall be reduced by any amounts due to the Insured on account of such loss under such prior insurance. Subject to the foregoing and to all the other terms and conditions of this Policy in the event that personal injury or property damage arising out of an occurrence covered hereunder is continuing at the time of termination of this Policy, the Company will continue to protect the Insured

> for liability in respect of such personal injury or property damage without payment of additional premium. *Trial Exhibit 82, New England Insurance Company (Hartford) Policy 791331, Conditions, "1. Prior Insurance and Non-Cumulation of Liability."*

The Mission National Insurance Company Policy MN # 009859's prior insurance provision states:

> It is agreed that if any loss covered hereunder is also covered in whole or in part under any other excess policy issued to the Insured prior to the inception date hereof the limit of liability hereon as stated in Item 2 of the Declarations shall be reduced by any amounts due to the Insured on account of such loss under such prior insurance. *Trial Exhibit 71, Mission-National Insurance Policy MN # 009859, Conditions, "C. Prior Insurance and Non-Cumulation of Liability."*

Transcontinental Policy No. RDX 009 61 67 05 (*Trial Exhibit 91*) incorporates the "Prior Insurance" provision of the immediately underlying policy, Chicago Insurance Company Policy 255U-0037285 (*Trial Exhibit 10*). It states:

> It is agreed that if any loss covered hereunder is also covered in whole or in part under any other excess Policy issued to the Insured prior to the inception date hereof, the limit of liability hereon as stated in Items 5 and 6 of the Declarations shall be reduced by any amounts due to the Insured on account of such loss under such prior insurance. Subject to the foregoing and to all the other terms and conditions of this Policy in the event that personal injury or property damage arising out of an occurrence covered hereunder is continuing at the time of termination of this

> Policy, the Company will continue to protect the Insured for liability in respect of such personal injury or property damage without payment of additional premium. *Trial Exhibit 10, Chicago Insurance Company Policy 255U-0037285, Conditions, "1. Prior Insurance and Non Cumulation of Liability."*

(c) Pollution Exclusion

Transcontinental Policy No. RDX 009 61 65 53 (*Trial Exhibit 89*) incorporates the pollution exclusion provisions from the immediate underlying policies, Integrity Policy No. XL 206329 (*Trial Exhibit 43*); National Union Fire Insurance Company Policy 9600316 (*Trial Exhibit 79*), Highlands Insurance Company Policy No. SR 21525 (*Trial Exhibit 30*), and Highlands Insurance Company Policy No. SR 21524 (*Trial Exhibit 29*) which, in turn, incorporates the pollution exclusion provision from the Mission-National Insurance Company Policy MN # 009859 (*Trial Exhibit 71*). It states:

> This Policy shall not apply: to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental. *Trial Exhibit 71, Mission-National Insurance Company Policy MN # 009859, Exclusions (i).*

Transcontinental Policy No. RDX 009 61 65 77 (*Trial Exhibit 90*) incorporates the pollution exclusion provision

from the immediate underlying policy, Highlands Insurance Company Policy No. 21833 (*Trial Exhibit 31*), which, in turn, incorporates the pollution exclusion provision from the Mission-National Insurance Company Policy MN # 009859 (*Trial Exhibit 71*). It states:

> This Policy shall not apply: to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental. *Trial Exhibit 71, Mission-National Insurance Company Policy MN # 009859, Exclusions (i).*

Transcontinental Policy No. RDX 009 61 67 05 (*Trial Exhibit 91*) incorporates the pollution exclusion provisions of the immediately underlying policies, Chicago Insurance Company Policy No. 255U-0037285 (*Trial Exhibit 10*), and Highlands Insurance Company Policy No. 22207 (*Trial Exhibit 32*), which, in turn, incorporate the pollution exclusion provision from the Mission-National Insurance Company Policy MN # 034643 (*Trial Exhibit 72*). It states:

> This Policy shall not apply: to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and

accidental. *Trial Exhibit 72, Mission-National Insurance Company Policy MN # 009859, Exclusions (h).*

(d) Assistance and Cooperation

Columbia Casualty Excess Policy No. RDX 417 02 36 (*Trial Exhibit 12*) incorporates the "Assistance and Co-Operation" provision from the immediate underlying policies. Integrity Policy No. XL 203282 (*Trial Exhibit 42*); Lexington Insurance Company Policy No. 5522463 (*Trial Exhibit 54*), and Highlands Insurance Policy No. 21280 (*Trial Exhibit 28*), which, in turn, incorporate the provision from the Holland-America Insurance Company Policy H-936888 (*Trial Exhibit 36*). The provision states:

> Except as respects Insuring Agreement II, the Company shall not be called upon to assume charge of the settlement or defense of any claim made or suit brought or proceeding instituted against the Insured but the Company shall have the right and shall be given the opportunity to associate with the Insured or the Insured's underlying insurers, or both, in the defense and control of any claim, suit or proceeding relative to an occurrence where the claim or suit involves, or appears reasonably likely to involve the Company, in which event the Insured and the Company shall co-operate in all things in the defense of such claim, suit or proceeding. *Trial Exhibit 36, Holland-America Insurance Company Policy H-936888, "Assistance and Co-Operation."*

Transcontinental Policy No. RDX 009 61 65 53 (*Trial Exhibit 89*) incorporates "Assistance and Co-Operation" provisions from the immediate underlying policies, Integrity

Policy No. XL 206329 (*Trial Exhibit 43*); National Union Fire Insurance Company Policy 9600316 (*Trial Exhibit 79*), and Highlands Insurance Company Policy No. SR 21525 (*Trial Exhibit 30*), which, in turn, incorporate the provision from Mission-National Insurance Company Policy MN # 009859 (*Trial Exhibit 71*). The provision states:

> Except as respects Insuring Agreement II, the Company shall not be called upon to assume charge of the settlement or defense of any claim made or suit brought or proceeding instituted against the Insured but the Company shall have the right and shall be given the opportunity to associate with the Insured or the Insured's underlying insurers, or both, in the defense and control of any claim, suit or proceeding relative to an occurrence where the claim or suit involves, or appears reasonably likely to involve the Company, in which event the Insured and the Company shall co-operate in all things in the defense of such claim, suit or proceeding. *Trial Exhibit 71, Mission-National Insurance Company Policy MN # 009859, Conditions, ¶ H.*

Transcontinental Policy No. RDX 009 61 65 77 (*Trial Exhibit 90*) incorporates "Assistance and Co-Operation" provision from the immediate underlying policy, Highland Insurance Company Policy No. 21833 (*Trial Exhibit 31*), which, in turn, incorporates the provision from Mission-National Insurance Company Policy MN # 009859 (*Trial Exhibit 71*). It states:

> Except as respects Insuring Agreement II, the Company shall not be called upon to assume charge of the settlement or defense of any claim made or suit brought or proceeding instituted

> against the Insured but the Company shall have the right and shall be given the opportunity to associate with the Insured or the Insured's underlying insurers, or both, in the defense and control of any claim, suit or proceeding relative to an occurrence where the claim or suit involves, or appears reasonably likely to involve the Company, in which event the Insured and the Company shall co-operate in all things in the defense of such claim, suit or proceeding. *Trial Exhibit 71, Mission-National Insurance Company Policy MN # 009859, Conditions, ¶ H.*

Transcontinental Policy No. RDX 009 61 67 05 (*Trial Exhibit 91*) incorporates "Assistance and Co-Operation" provisions from the immediate underlying policies, Chicago Insurance Company Policy 255U-0037285 (*Trial Exhibit 10*) and Highlands Insurance Company Policy No. 22207 (*Trial Exhibit 32*), which, in turn, incorporate the provision from the Mission-National Insurance Company Policy MN # 034643 (*Trial Exhibit 72*). The provision states:

> Except as respects Insuring Agreement II, the Company shall not be called upon to assume charge of the settlement or defense of any claim made or suit brought or proceeding instituted against the Insured but the Company shall have the right and shall be given the opportunity to associate with the Insured or the Insured's underlying insurers, or both, in the defense and control of any claim, suit or proceeding relative to an occurrence where the claim or suit involves, or appears reasonably likely to involve the Company, in which event the Insured and the Company shall co-operate in all things in the defense of such claim, suit or proceeding. *Trial Exhibit*

72, Mission-National Insurance Company Policy MN # 034643, Conditions, ¶ F.

(e) Maintenance of Underlying Insurance

Columbia Casualty Excess Policy No. RDX 417 02 36 (*Trial Exhibit 12*) incorporates the "Maintenance of Underlying Insurance" provisions from the immediately underlying policies, Integrity Policy No. XL 203282 (*Trial Exhibit 42*) and Lexington Insurance Company Policy No. 5522463 (*Trial Exhibit 54*), which, in turn, incorporate the provision from the Holland-America Insurance Company Policy H-936888 (*Trial Exhibit 36*). The provision states:

> It is a condition of this policy that the policy or policies referred to in the attached "Schedule of Underlying Insurances" shall be maintained in full effect during the policy period without reduction of coverage or limits except for any reduction of the aggregate limit or limits contained therein solely by payment of claims in respect of accidents and/or occurrences occurring during the period of this policy. Failure of the Named Insured to comply with the foregoing shall not invalidate this policy but in the event of such failures, the Company shall only be liable to the same extent as it would have been had the Named Insured complied with the same condition. *Trial Exhibit 36, Holland-America Insurance Company Policy H-936888, Conditions, ¶ S.*

Additionally, Columbia Casualty Excess Policy No. RDX 417 02 36 (*Trial Exhibit 12*) incorporates the "Maintenance of Underlying Umbrella Insurance" provision from the immediately underlying Highlands Insurance Policy No. 21280 (*Trial Exhibit 28*). It states:

> It is a condition of this Policy that the Underlying Umbrella Policies shall be maintained in full effect during the currency hereof except for any reduction of the aggregate limits contained herein solely by payment of claims in respect of accidents and/or occurrences occurring during the period of this Policy. Failure of the Named Insured to comply with the foregoing shall not invalidate this Policy but in the event of such failures, the Company shall only be liable to the same extent as they would have been had the Named Insured complied with the said condition. *Trial Exhibit 28. Highlands Insurance Policy No. 21280, Conditions, "2. Maintenance of Underlying Umbrella Insurance."*

Transcontinental Policy No. RDX 009 61 65 53 (*Trial Exhibit 89*) incorporates the "Maintenance of Underlying Insurance" provisions from the immediately underlying policies Integrity Policy No. XL 206329 (*Trial Exhibit 43*) and National Union Fire Insurance Company Policy 9600316 (*Trial Exhibit 79*), which, in turn, incorporate the provision from the Mission-National Insurance Company Policy MN # 009859 (*Trial Exhibit 71*). It states:

> It is a condition of this policy that the policy or policies referred to in the attached "Schedule of Underlying Insurances" shall be maintained in full effect during the policy period without reduction of coverage or limits except for any reduction of the aggregate limit or limits contained there in solely by payment of claims in respect of accidents and/or occurrences occurring during the period of this policy. Failure of the Named Insured to comply with the foregoing shall not invalidate this policy but in the event of such failures, the Company shall only be liable to the same extent as it would have been had the

> Named Insured complied with the same condition. *Trial Exhibit 71, Mission-National Insurance Company Policy MN # 009859, Conditions, ¶ S.*

Additionally, Transcontinental Policy No. RDX 009 61 65 53 (*Trial Exhibit 89*) incorporates the "Mai...enance of Underlying Umbrella Insurance" provision from the immediately underlying Highlands Insurance Policy No. 21280 (*Trial Exhibit 30*). It states:

> It is a condition of this Policy that the Underlying Umbrella Policies shall be maintained in full effect during the currency hereof except for any reduction of the aggregate limits contained herein solely by payment of claims in respect of accidents and/or occurrences occurring during the period of this Policy. Failure of the Named Insured to comply with the foregoing shall not invalidate this Policy but in the event of such failures, the Company shall only be liable to the same extent as they would have been had the Named Insured complied with the said condition. *Trial Exhibit 30, Highlands Insurance Policy No. 21280, Conditions, "2. Maintenance of Underlying Umbrella Insurance."*

Transcontinental Policy No. RDX 009 61 65 77 (*Trial Exhibit 90*) incorporates "Maintenance of Underlying Insurance" provision from the immediate underlying policy, Highlands Insurance Company Policy No. 21833 (*Trial Exhibit 31*), which, in turn, incorporates the provision from Mission-National Insurance Company Policy MN # 009859 (*Trial Exhibit 71*). It states:

> It is a condition of this policy that the policy or policies referred to in the attached "Schedule of Underlying Insurances" shall be maintained in

> full effect during the policy period without reduction of coverage or limits except for any reduction of the aggregate limit or limits contained therein solely by payment of claims in respect of accidents and/or occurrences occurring during the period of this policy. Failure of the Named Insured to comply with the foregoing shall not invalidate this policy but in the event of such failures, the Company shall only be liable to the same extent as it would have been had the Named Insured complied with the same condition. *Trial Exhibit 71, Mission-National Insurance Company Policy MN # 009859, Conditions, ¶ S.*

Transcontinental Policy No. RDX 009 61 67 05 (*Trial Exhibit 91*) incorporates the "Maintenance of and Restrictions in Underlying Insurance" provision from the immediate underlying policy, Highlands Insurance Company Policy No. 22207 (*Trial Exhibit 32*), which, in turn, incorporates the provision from the Mission-National Insurance company Policy MN # 034643 (*Trial Exhibit 72*). The provision states:

> It is a condition of this policy that the policy or policies referred to in the attached "Schedule of Underlying Insurances" shall be maintained in full effect during the policy period without reduction of coverage or limits except for any reduction of the aggregate limit or limits contained therein solely by payment of claims in respect of accidents and/or occurrences occurring during the period of this policy. Failure of the Named Insured to comply with the foregoing shall not invalidate this policy but in the event of such failures, the Company shall only be liable to the same extent as it would have been had the Named Insured complied with the same condition. *Trial*

Exhibit 72, Mission-National Insurance Company Policy MN # 009859, Conditions, ¶ P.

Additionally, Transcontinental Policy No. RDX 009 61 67 05 (*Trial Exhibit 91*) incorporates the Chicago Insurance Company Policy 255U-0037285's (*Trial Exhibit 10*) "Maintenance of Underlying Umbrella Insurance" provision. It states:

> This Policy is subject to the same terms, definitions, exclusions and conditions (except as regards the premium, the amount and limits of liability and except as otherwise provided herein) as are contained in or as may be added to the Underlying Umbrella Policies stated in Item 2 of the Declarations prior to the happening of an occurrence for which is made hereunder. It is a condition of this policy that Underlying Umbrella Policies shall be maintained in full effect during the currency hereof except for any reduction of the aggregate limits contained therein solely by payment in respect of accidents and/or occurrences occurring during the period of this Policy or by the operation of Condition C of Underlying Umbrella Policies. *Trial Exhibit 10, Chicago Insurance Company Policy 255U-0037285, Conditions, "2. Maintenance of Underlying Umbrella Insurance."*

(f) Worker's Compensation Provisions

Columbia Casualty Umbrella Policy No. RDU 36 52 80 (*Trial Exhibit 11*) incorporates the following Worker's [sic] Compensation exclusion from the underlying American Home Policy No. GLA 343-24-19 (*Trial Exhibit 5*):

This insurance does not apply . . .

(vii) to any obligation for which the insured or any carrier as his insurer may be held liable under any workmen's [sic] compensation, unemployment compensation or disability benefits law, or under any similar law. *Trial Exhibit 5, American Home Policy.*

Columbia Casualty Excess Policy No. RDX 417 02 36 (*Trial Exhibit 12*) incorporates the "Worker's [sic] Compensation" exclusion from the Holland-America Insurance Company Policy H-936888 (*Trial Exhibit 36*). It states:

This Policy is subject to the following exclusions:

This policy does not apply –

to any obligation for which the insured and any company as its insurer may be held liable under any Workers' Compensation unemployment compensation or disability benefits law provided; however, that this exclusion does not apply to liability of others assumed by the Named Insured under contract or agreement. *Trial Exhibit 36, Holland-America Insurance Company Policy H-936888, Exclusions (a).*

Transcontinental Policy No. RDX 009 61 65 53 (*Trial Exhibit 89*) incorporates the "Worker's Compensation" exclusion provision from the immediately underlying policies, Integrity Policy No. XL 206329 (*Trial Exhibit 43*), National Union Fire Insurance Company Policy 9600316 (*Trial Exhibit 79*), and Highlands Insurance Company Policy No. 21525 (*Trial Exhibit 30*), which, in turn, incorporate the exclusion provision from the Mission-National Insurance Company Policy MN # 009859 (*Trial Exhibit 71*). The provision states:

> This Policy is subject to the following exclusions:
>
> This policy does not apply –
>
> to any obligation for which the insured and any company as its insurer may be held liable under any Workers' Compensation unemployment compensation or disability benefits law provided; however, that this exclusion does not apply to liability of others assumed by the Named Insured under contract or agreement. *Trial Exhibit 71, Mission-National Insurance Company Policy MN # 009859, Exclusions (a).*

Transcontinental Policy No. RDX 009 61 65 77 (*Trial Exhibit 90*) incorporates the "Worker's Compensation" exclusion provision from the immediate underlying policy, Highlands Insurance Company Policy No. 21833 (*Trial Exhibit 31*), which, in turn, incorporates the provision from Mission-National Insurance Company Policy MN # 009859 (*Trial Exhibit 71*). It states:

> This Policy is subject to the following exclusions:
>
> This policy does not apply –
>
> to any obligation for which the insured and any company as its insurer may be held liable under any Workers' Compensation unemployment compensation or disability benefits law provided; however, that this exclusion does not apply to liability of others assumed by the Named Insured under contract or agreement. *Trial Exhibit 71, Mission-National Insurance Company Policy MN # 009859, Exclusions (a).*

Transcontinental Policy No. RDX 009 61 67 05 (*Trial Exhibit 91*) incorporates the "Worker's Compensation" exclusion provision from the immediate underlying policies,

Highlands Insurance Company Policy No. 22207 (*Trial Exhibit 32*) and Chicago Insurance Company Policy 255U-0037285's (*Trial Exhibit 10*), which, in turn, incorporate the provision from the Mission-National Insurance Company Policy MN # 034643 (*Trial Exhibit 72*). The provision states:

> This Policy is subject to the following exclusions:
>
> This policy does not apply –
>
> to any obligation for which the insured and any company as its insurer may be held liable under any Workers' Compensation unemployment compensation or disability benefits law provided; however, that this exclusion does not apply to liability of others assumed by he Named Insured under contract or agreement. *Trial Exhibit 72, Mission-National Insurance Company Policy MN # 034643, Exclusions (a).*

(g) Integrity Provisions

Columbia Policy No. RDX 417 02 36 (*Trial Exhibit 12*), Transcontinental Policy No. RDX 009 61 65 53 (*Trial Exhibit 89*), and Transcontinental Policy No. RDX 009 61 67 05 (*Trial Exhibit 91*) incorporate the following "Notice of Loss" provision from the underlying Integrity Insurance Company policies:

> Notice of Loss. The insured shall immediately advise the Company of any accident or occurrence which appears likely to result in liability under this Policy and of subsequent developments likely to affect the Company's liability herein under. At no time shall the Company be

called upon to assume charge of the settlement or defense of any claims made or suits brought or proceedings instituted against the Insured, but the Company shall have the right and shall be given the opportunity to associate with the Insured or its underlying insurer or insurers, or both, in the control, defense and/or trial of any claims, suits or proceeding which, in the opinion of the Company, involves or appears reasonably likely to involve the Company. If the company avails itself of such right and opportunity, the Insured, any underlying insurer or insurers and the Company shall cooperate in the control, defense and/or trial of such claims, suits or proceedings, so as to affect a final determination thereof. Failure on the part of the insured or the underlying insurer or insurers to cooperate shall relieve the Company, at its option, of liability under this Policy.

The Insured shall be solely responsible for the investigation, settlement, defense and final disposition of any claim made or suit brought or proceeding initiated against the Insured to which this Policy would apply and which no underlying insurer or insurers is obligated to defend. The insured shall use due diligence and prudence to settle all such claims and suits which in the exercise of sound judgment should be settled, provided, however, that the insured shall not make or agree to any settlement for any sum in excess of the underlying insurance, without the approval of the company. *Trial Exhibit 42, Integrity Insurance Company Policy No. XL 203282, Terms and Conditions, Notice of Loss, ¶¶ 8 and 9; Trial Exhibit 43, Integrity Insurance Company Policy No. XL 206329, Terms and Conditions, Notice of*

Loss, ¶¶ 8 and 9, Trial Exhibit 44, Integrity Insurance Company Policy No. XL 208582, Terms and Conditions, Notice of Loss, ¶¶ 8 and 9.

e. Federal Insurance Company

A. The Federal Insurance Company ("Federal") has four policies at issue in Phase 1A. Each policy has the same policy number. They are:

Policy Number	Policy Period	Ex. Number
7935 72 05	7/1/81 to 7/1/82	16
	7/1/82 to 7/1/83	17
	7/1/83 to 7/1/84	18
	7/1/84 to 7/1/85	19

For the 1981/1982 policy year, the Federal policy was a fifth level excess policies. For the 1982/1983 and 1984/1985 policy years, the Federal policy shared the fourth tier of excess coverage with Transcontinental policies. For the 1983/1984 policy year, the Federal policy shared the fifth tier of excess coverage with Transcontinental policies.

B. The Federal "incorporation" provision states:

> In consideration of the payment of the required premium and subject to all the terms of this policy, the Company agrees to pay on behalf of the insured LOSS resulting from any occurrence insured by the terms and provisions of the First UNDERLYING INSURANCE policy scheduled in Item 6 of the Declarations (except for the Limits of Liability and defense provisions, if any). *Trial Exhibits 16, 17, 18, and 19, Federal Insurance Company Policy 7935 72 05, Policy Provisions, "1. Insuring Agreement."*

C. The Federal definition of "Loss" states:

> LOSS – Meaning the amount of the principal sum, award or verdict, actually paid or payable in cash in the settlement or satisfaction of claim for which the Insured is liable, either by adjudication or compromise with the written consent of the Company, after making deductions for all recoveries and salvage. *Trial Exhibits 16, 17, 18, and 19, Federal Insurance Company Policy 7935 72 05, Policy Provisions, "4. Glossary."*

D. Except as identified below, Fuller-Austin has no other disputes regarding whether a particular provision is incorporated into the Federal Policies from any policy underlying the Federal Policies.

E. As to the controverted issues relating to incorporation, the Court rules:

(a) The Federal Insurance Company Policies 7935 72 05 (*Trial Exhibits 16, 17, 18, and 19*) incorporate the portion of the "Loss Payable" provisions, set forth below, of the 1981-1982 Holland-America Insurance Policy H-93688 (*Trial Exhibit 36*), the 1982-1984 Mission National Insurance Policy # MN 009859 (*Trial Exhibit 71*), the 1984-1985 Mission National Insurance Policy #MN 034643 (*Trial Exhibit 72*). The Holland-America Insurance Policy H-93688's provision states:

> The Insured shall make a definite claim for any loss for which the Company may be liable under the policy within twelve (12) months after the Insured shall have paid an amount of ultimate net loss in excess of the amount borne by the Insured or after the Insured's liability shall have been fixed and rendered certain either by final judgment against the Insured after actual trial or by

> written agreement of the Insured, the claimant, and the Company. If any subsequent payments shall be made by the Insured on account of the same occurrence, additional claims shall be made similarly from time to time. Such losses shall be due and payable within thirty (30) days after they are respectively claimed and proven in conformity with this policy. *Trial Exhibit 36, Holland-America Insurance Company, Policy H-93688, Conditions, ¶ J.*

The Mission National Insurance Policies # MN 009859 and # MN 034643 provision states:

> The Insured shall make a definite claim for any loss for which the Company may be liable under the policy within twelve (12) months after the Insured shall have paid an amount of ultimate net loss in excess of the amount borne by the Insured or after the Insured's liability shall have been fixed and rendered certain either by final judgment against the Insured after actual trial or by written agreement of the Insured, the claimant, and the Company. If any subsequent payments shall be made by the Insured on account of the same occurrence, additional claims shall be made similarly from time to time. Such losses shall be due and payable within thirty (30) days after they are respectively claimed and proven in conformity with this policy. *Trial Exhibit 71, Mission National Umbrella Policy # MN 009859, Conditions, ¶ J, Trial Exhibit 72, Mission National Umbrella Policy # MN 034643, Condition ¶ H.*

f. The "Hartford" Insurance Companies

A. The Hartford companies have three excess policies at issue:

Carrier	Policy Number	Policy Period	Ex. Number
First State	924273	2/14/77 to 3/15/78	21
New England Re	791331	7/1/83 to 7/1/84	82
Twin City	TXS 102899	7/1/83 to 7/1/84	92

B. The First State Policy No. 924273's (*Trial Exhibit 21*) "incorporation" provision states:

> This policy is subject to the same terms, definitions, exclusions and conditions (except as regards the premium, the amount and limits of liability and except as otherwise provided herein) as are contained in or as may be added to the Underlying [Umbrella] Policies stated in Item 2 of the Declarations prior to the happening of an occurrence for which claim is made hereunder. *Trial Exhibit 21, First State Policy No. 924273, Conditions, "2. Maintenance of Underlying Insurance."*

C. The New England Policy No. 791331's (*Trial Exhibit 82*) "incorporation" provision states:

> This policy is subject to the same terms, definitions, exclusions and conditions (except as regards the premium, the amount and limits of liability and except as otherwise provided herein) as are contained in or as may be added to the Underlying [Umbrella] Policies stated in Item 5

> of the Declarations prior to the happening of an occurrence for which claim is made hereunder. *Trial Exhibit 82, New England Policy No. 791331, Conditions, "2. Maintenance of Underlying Insurance."*

D. The Twin City Policy No. 102899's (*Trial Exhibit 92*) "incorporation" provision states:

> Except as otherwise provided by this policy, the insurance afforded herein shall follow all the terms, conditions, definitions and exclusions of the controlling underlying insurance policy designated in Item 6 of the declarations. *Trial Exhibit 92, Twin City Policy No. 102899, Conditions, "2. Maintenance of Underlying Insurance."*

E. Except as identified below, Fuller-Austin has no other disputes regarding whether a particular provision is incorporated into the Hartford Policies from any policy underlying the Hartford Policies.

F. As to the controverted issues relating to incorporation, the Court rules as follows:

(a) The first sentence of the "Loss Payable" provision of the Mission National Umbrella Policy # MN 009859 (*Trial Exhibit 71*) is not incorporated into New England Policy No. 791331 (*Trial Exhibit 82*) or Twin City Policy No. TXS 102899 (*Trial Exhibit 92*). It states:

> Liability under this policy with respect to any occurrence shall not attach unless and until the Assured, or the Assured's underlying insurer, shall have paid the amount of the underlying limits on account of such occurrence. *Trial Exhibits 71, Mission National Umbrella Policy # MN 009859, Conditions, Loss Payable, ¶ J.*

The balance of the Mission National Umbrella Policy "Loss Payable" provision, consisting of three sentences, is incorporated into New England Policy No. 791331 (*Trial Exhibit 82*) and Twin City Policy No. TXS 102899 (*Trial Exhibit 92*). These sentences state:

> The Assured shall make a definite claim for any loss for which the Underwriters may be liable under the policy within twelve (12) months after the Assured shall have paid an amount of ultimate net loss in excess of the amount borne by the Assured or after the Assured's liability shall have been fixed and rendered certain either by final judgment against the Assured after actual trial or by written agreement of the Assured, the claimant, and Underwriters. If any subsequent payment shall be made by the Assured on account of the same occurrence, additional claims shall be made similarly from time to time. Such losses shall be due and payable within thirty (30) days after they are respectively claimed and proved in conformity with this policy. *Trial Exhibit 71, Mission National Umbrella Policy # MN 009859, Conditions, Loss Payable, ¶ J.*

(b) Although not disputed by the Hartford Insurance Company, the Service of Suit endorsement ("Assistance and Cooperation" provision) contained within the Columbia Casualty (CNA) Policy RDU 36 52 80 *(Trial Exhibit 11)* is not incorporated into First State Policy No. 924273 (*Trial Exhibit 82*).

g. Home Insurance Company

A. Home Insurance Company Policy No. HEC 9006863 (*Trial Exhibit 37*) was issued for the period

beginning on February 1, 1977 and expiring on March 2, 1978. The Home Insurance Policy is an excess policy that shares a third layer of coverage with two other policies.

B. There are two provisions in Home's Policy discussing incorporation. The first "incorporation" provision states:

> This Policy is subject to the same warranties, terms and conditions (except as otherwise provided herein) as are contained in or as may be added to the Underlying Coverage prior to the happening of an accident or occurrence, whichever is applicable, for which claim is made hereunder . . . *Trial Exhibit 37, Home Insurance Policy No. HEC 9006863, Conditions, "1. Maintenance of Underlying Insurance."*

The other "incorporation" provision states that the excess coverage is afforded under:

> the same terms, conditions and exclusions of the Columbia Casualty Insurance Company Policy No. (to be advised) and excess of the limits set forth in Item 2 . . . *Trial Exhibit 37, Home Insurance Policy No. HEC 9006863, Item 3, "Excess Coverage Afforded by this Policy."*

C. Except as identified below, Fuller-Austin has no other disputes regarding whether a particular provision is incorporated into the Home Insurance Company from any policy underlying that policy.

D. As to the controverted issues relating to incorporation, the Court rules as follows:

(a) Home's Insurance Company Policy No. HEC 9006863 *(Trial Exhibit 37)* incorporates the terms, conditions and exclusions of the Columbia Casualty Insurance

Company (CNA) Umbrella Policy No. RDU 365 28 50 (*Trial Exhibit 11).*

(*b*) Home Insurance Company Policy No. HEC90006863 (*Trial Exhibit 37*) incorporates the "Other Insurance" provision contained within the Columbia Casualty Insurance Company (CNA) Policy No. RDU 365 28 50 *(Trial Exhibit 11).* This provision states:

> If, with respect to loss and ultimate net loss covered hereunder, the insured has other insurance, whether primary, excess or contingent basis, there shall be no insurance afforded hereunder as respects loss and ultimate net loss: provided, that if the limit of liability of this policy is greater than the limit of liability provided by the other insurance, this policy shall afford excess insurance over and above other insurance in an amount sufficient to give the insured, as respects the layer of coverage afforded by this policy, a total limit of liability equal to the limit of liability afforded by this policy.
>
> This condition does not apply with respect to the underlying insurance or excess insurance purchased specifically to be in excess of this policy. *Trial Exhibit 11, Columbia Casualty Insurance Company (CNA) Policy No. RDU 365 28 50, Conditions, ¶ 10 "Other Insurance."*

h. The International Insurance Company

A. International Insurance Company ("International") as the successor-in-interest to International Surplus Lines Insurance Company ("ISLIC"), has one policy at issue, Policy No. XSI 7030 effective 7/1/80 – 7/1/81 *(Trial Exhibit 45).*

B. The ISLIC Policy No. XSI 7030 "incorporation" provision states:

> The provisions of the immediate underlying policy are incorporated as a part of this policy except for any obligation to investigate and defend and pay for costs and expenses incident to the same, the amount of the limits of liability, any 'other insurance' provision and any other provisions therein which are inconsistent with the provisions of this policy. *Trial Exhibit 45, ISLIC Policy XSI 7030, Part I – Insuring Agreements, "1. Excess Liability Indemnity."*

C. The ISLIC Policy No. XSI 7030's definition of "Immediate Underlying Policy" states:

> "Immediate underlying policy" means the policy of the underlying insurance which provides the layer of coverage, whether primary or excess, immediately preceding the layer of coverage provided by this policy. *Trial Exhibit 45, ISLIC Policy XSI 7030, Part III – Definitions, "1. Immediate Underlying Policy."*

D. Endorsement No. 6 to ISLIC Policy XSI 7030 identifies the three policies immediately below the ISLIC policy: Lexington Insurance Company Policy No. 5521800 *(Trial Exhibit 52)*, Integrity Insurance Company Policy No. XL201746 *(Trial Exhibit 41)* and Highlands Insurance Company Policy No. SR 21090 (*Trial Exhibit 26*). Each of these three policies contains its own "following form" provision. Thus, these three policies incorporate certain provisions from the policies underlying them in the 7/1/80 – 7/1/81 policy year: Lexington Insurance Company Policy No. 5521799 *(Trial Exhibit 51)*, Highlands Insurance Company Policy No. 21089 *(Trial Exhibit 25)* and Holland-America

Insurance Company ("Holland-America") Policy No. H88300 *(Trial Exhibit 35).*

E. Except as identified below, Fuller-Austin has no other disputes regarding whether a particular provision is incorporated into the ISLIC Policy.

F. As to the controverted issues relating to incorporation/following form, the Court rules as follows:

(a) Holland-America Insurance Company Policy No. H88300's (*Trial Exhibit 35*) "Loss Payable" provision is incorporated into ISLIC XSI 7030 *(Trial Exhibit 45).* It states:

> Liability under this policy with respect to any occurrence shall not attach unless and until the [Insured], or the [Insured's] underlying insurer, shall have paid the amount of the underlying limits on account of such occurrence. The [Insured] shall make a definite claim for any loss for which the [Insurer] may be liable under the policy within twelve (12) months after the [Insured] shall have paid an amount of ultimate net loss in excess of the amount borne by the [Insured] or after the [Insured's] liability shall have been fixed and rendered certain either by final judgment against the [Insured] after actual trial or by written agreement of the [Insured], the claimant, and [Insurer]. . . . *Trial Exhibit 35, Holland-America Policy, Conditions, ¶ J.*

(*b*) The following provision from the Integrity Insurance Company Policy XL201746 is incorporated into ISLIC XSI 7030. It states:

> The Company's obligation to pay any ultimate net loss and costs with respect to any accident or occurrence falling within the term of this Policy

> shall not attach until the amount of the applicable underlying limit has been paid by or on behalf of the Insured on account of such accident or occurrence. The Insured shall make claim for any ultimate net loss or costs under this Policy within a period of not exceeding twelve (12) months after, (a) the Insured shall have paid ultimate net loss in excess of the underlying limit, with respect to any accident or occurrence, or (b) the Insured's obligation to pay such amounts shall have been finally determined, either by judgment against the Insured after actual trial or by written agreement of the Insured, the claimant and the company. *Trial Exhibit 41, Integrity Insurance Company Policy, Terms and Conditions, Loss Payable, ¶ 11.*

(c) The following provision from the Integrity Insurance Company Policy XL201746 is incorporated into ISLIC XSI 7030. It states:

> . . . The Insured shall use due diligence and prudunce to settle all such claims and suits which in the exercise of sound judgment should be settled, provided, however, that the Insured shall not make or agree to any settlement for any sum, in excess of the underlying insurance, without the approval of the Company. *Trial Exhibit 41, Integrity Insurance Company Policy, Terms and Conditions, Notice of Loss, ¶ 9.*

(d) The following provision from the Lexington Insurance Policy No. 5521800 *(Trial Exhibit 52)* is incorporated into ISLIC XSI 7030. It states:

> Liability of the Company under this policy shall not attach unless and until the Insured or the Insureds' Underlying Insurance has paid or has been held liable to pay the total applicable underlying

limits. *Trial Exhibit 52, Lexington Insurance Company Policy No. 5521800, "1. Insuring Agreement."*

i London Market Insurance Company

D. London Market Insurers subscribed to the following policies that are at issue in this portion of the litigation:

Policy/Type	*Period*	*Trial Ex Number*
CU10216/Excess	5/1/68-6/1/71	66
53086/Excess	1/1/76-1/31/77	61
53386/62474/Excess	1/31/77-3/2/78	67
53658/62739	3/2/78-2/1/79	68
53930/62955/Excess	2/1/79-7/1/80	69
54362/63289/Excess	7/1/80-7/1/81	70

E. London Market Policies CU 10216 *(Trial Exhibit 66)*, 53086 *(Trial Exhibit 61)*, and 53386 *(Trial Exhibit 67)* "incorporation" provisions state:

> This Policy is subject to the same terms, definitions, exclusions and conditions (except as regards the premium, the amount and limits of liability and except as otherwise provided herein) as are contained in or as may be added to the Underlying [Umbrella] Policies stated in Item [2] of the Declarations prior to the happening of an occurrence for which claim is made hereunder. *Trial Exhibits 66, 61, and 67, London Market Policies CU 10216, 53086, and 53386, Conditions, "Maintenance of Underlying Umbrella Insurance."*

C. The London Market Policies 54362 *(Trial Exhibit 70)* and 53930 *(Trial Exhibit 69)* "incorporation" provisions state:

> This Policy is subject to the same terms, definitions, exclusions and conditions (except as regards the premium, the amount and limits of liability and except as otherwise provided herein) as are contained in or as may be added to the Underlying [Umbrella] Policies stated in Item [2] of the Declarations prior to the happening of an occurrence for which claim is made hereunder. Should, however, any alteration be made in the premium for the Underlying [Umbrella] Policies during the currency of this Policy, Underwriters reserve the right to adjust the premium hereon accordingly. *Trial Exhibits 70, 69, and 68, London Market Policies 54362, 53930, and 53658, Conditions, "Maintenance of Underlying Insurance."*

D. Except as identified below, Fuller-Austin has no other disputes regarding whether a particular provision is incorporated into the London Market Policies from any policy underlying the London Market Policies.

E. As to the controverted issues relating to incorporation, the Court rules as follows:

(a) Loss Payable Provisions

Concerning London Market Excess Policy CU 10216 *(Trial Exhibit 66)*, the first sentence of the "Loss Payable" provision of the immediately underlying London Market Excess Umbrella Policy, CU 10215 *(Trial Exhibit 65)*, is not incorporated. It states:

> Liability under this policy with respect to any occurrence shall not attach unless and until the Assured, or the Assured's underlying insurer, shall have paid the amount of the underlying limits on account of such occurrence. *Trial Exhibit 65, London Market Excess Umbrella Policy CU 10215, Conditions, ¶ J.*

However, the balance of the London Market Excess Umbrella Policy "Loss Payable" provision, consisting of three sentences, is incorporated into London Market Excess Policy CU 10216 *(Trial Exhibit 66).*

> The [Assured] shall make a definite claim for any loss for which the [Underwriters] may be liable under the policy within twelve (12) months after the [Assured] shall have paid an amount of ultimate net loss in excess of the amount borne by the [Assured] or after the [Assured's] liability shall have been fixed and rendered certain either by final judgment against the [Assured] after actual trial or by written agreement of the [Assured], the claimant, and [Underwriters]. If any subsequent payment shall be made by the [Assured] on account of the same occurrence, additional claims shall be made similarly from time to time. Such losses shall be due and payable within thirty (30) days after they are respectively claimed and proven in conformity with this policy. *Trial Exhibit 65, London Market Excess Umbrella Policy CU 10215, Conditions, ¶ J.*

Concerning London Market Excess Policy 53086 *(Trial Exhibit 61)*, the first sentence of the "Payment of Loss" provision of the immediately underlying Wausau Policy No. 2226-03-030862 *(Trial Exhibit 110)* is not incorporated. It states:

> The company shall not be obligated to make any payment under this policy of any loss until all amounts not in excess of the retained limit have been paid by others. *Trial Exhibit 110, Wausau Policy No. 2226-03-030862, Conditions, "Payment of Loss."*

However, the remaining balance of the Wausau Policy No. 2226-03-030862 *(Trial Exhibit 110)* "Payment of Loss" provision, is incorporated into the London Market Excess Policy 53086 (*Trial Exhibit 61*). It states:

> The Company shall thereafter pay promptly all claims due under this policy. *Trial Exhibit 110, Wausau Policy No. 2226-03-030862, Conditions, "Payment of Loss."*

Concerning London Market Excess Policy 53930 *(Trial Exhibit 69)* the American Policy (Fireman's Fund) XLX 136 22 92's (*Trial Exhibit 20*) "Loss Payable" provision, which is incorporated from the Holland-America Policy No. H88260's Loss Payable provision, *(Trial Exhibit 34)*, is incorporated. The incorporated provision states:

> The Assured shall make a definite claim for any loss for which the Underwriters may be liable under the policy within twelve (12) months after the Assured shall have paid an amount of ultimate net loss in excess of the amount borne by the Assured or after the Assured's liability shall have been fixed and rendered certain either by final judgment against the Assured after actual trial or by written agreement of the Assured, the claimant, and Underwriters. If any subsequent payments shall be made by the Assured on account of the same occurrence, additional claims shall be made similarly from time to time. Such losses shall be due and payable within thirty (30)

> days after they are respectively claimed and proven in conformity with this policy. *Trial Exhibit 34, Holland-America Policy No. H88260, Conditions, ¶ J.*

Concerning London Market Excess Policy 54362 *(Trial Exhibit 70)*, the "Loss Payable" provision of the ISLIC Policy XSI 7030 *(Trial Exhibit 45)*, which is incorporated from the Holland-America Policy No. H88300's *(Trial Exhibit 35)* Loss Payable provision, is incorporated. It states:

> The Assured shall make a definite claim for any loss for which the Underwriters may be liable under the policy within twelve (12) months after the Assured shall have paid an amount of ultimate net loss in excess of the amount borne by the Assured or after the Assured's liability shall have been fixed and rendered certain either by final judgment against the Assured after actual trial or by written agreement of the Assured, the claimant, and Underwriters. If any subsequent payments shall be made by the Assured on account of the same occurrence, additional claims shall be made similarly from time to time. Such losses shall be due and payable within thirty (30) days after they are respectively claimed and proven in conformity with this policy. *Trial Exhibit 35, Holland-America Policy No. H88300, Conditions ¶ J.*

Concerning London Market Excess Policy 54362 *(Trial Exhibit 70)*, the definition of "Loss" contained in the ISLIC Policy XSI 7030 *(Trial Exhibit 45)*, is incorporated in its entirety. It states:

> "Loss" means the sums paid as damages in settlement of a claim or in satisfaction of a judgment for which the insured is legally liable, after making deductions for all recoveries, salvages and other instrument (whether recoverable or not) other than

> the underlying insurance and excess insurance purchased specifically to be in excess of this policy. "Loss" does not include investigation, adjustment, defense or appeal costs and expenses nor costs and expenses incident to any the same, notwithstanding that the underlying insurance may provide insurance for such costs and expenses. *Trial Exhibit 45, ISLIC Policy XSI 7030, Part 11 – Definitions, "1. Immediate Underlying Policy."*

(b) "Prior Insurance" Provisions

Concerning London Market Excess Policy 53086 *(Trial Exhibit 61)*, the immediately underlying Wausau Policy 2226-03-030862's *(Trial Exhibit 110)* "Non-cumulation of liability" provision is incorporated. The provision states:

> If the same occurrence gives rise to personal injury, property damage or advertising injury that occurs partly before and partly within any one annual period, the limit of liability applicable to each such occurrence and any aggregate limit of liability applicable to such injury or damage shall be reduced by the amount of all payments made by the company with respect to such occurrence, either under a previous policy or policies issued by the company of which this is a replacement, or under this policy with respect to previous annual periods thereof. *Trial Exhibit 110, Wausau Policy 2226-03-030862, IV, Limits of Liability, (c) Non-cumulation of liability.*

Concerning London Market Policy 53086 (*Trial Exhibit 61*), the immediate underlying Wausau Policy 2226-03-030862, *(Trial Exhibit 110)* "Other Insurance With the Company" clause is incorporated. It states:

> If collectible insurance under any other policy issued by the company is available to the insured

> covering a loss also covered by this policy, the company's total liability under all such policies as respects such loss shall not exceed the greatest applicable limit of liability; provided, that this condition does not apply to insurance written by the company as underlying insurance or as insurance in excess of this policy. *Trial Exhibit 110, Wausau Policy 2226-03-030862, Conditions, ¶ 8.*

Concerning London Market Policy CU 10216 *(Trial Exhibit 66)*, the immediately underlying London Market Excess Umbrella Policy's CU 10215 *(Trial Exhibit 65)* "Prior Insurance" provision is incorporated. It states:

> It is agreed that if any loss covered hereunder is also covered in whole or in part under any other excess policy issued to the Assured prior to the inception date hereof the limit of liability hereon as stated in item [] of the Declarations shall be reduced by any amounts due to the Assured on account of such loss under such prior insurances.
>
> Subject to the foregoing paragraph, and to all the other terms and conditions of this policy in the event that personal injury or property damage, arising out of an occurrence covered hereunder is continuing at the time of termination of this policy Underwriters will continue to protect the Assured for liability in respect of such personal injury or property damage without payment of additional premium. *Trial Exhibit 65, London Market Excess Umbrella Policy CU 10215, Conditions, ¶ C "Prior Insurance."*

(b) Notice of Occurrence Provision

Concerning London Market Excess Policy 53930/62955 *(Trial Exhibit 69)*, the underlying American Policy XLX 136-22-92's *(Trial Exhibit 20)* "Notice of Occurrence" provision is incorporated. It states:

> The Company shall not, however, be called upon to assume charge of the settlement or defense of any claims made, or suits brought, or proceedings instituted against the Insured, but shall have the right and opportunity to be associated with the Insured in the defense and trial of any such claims, suits or proceedings relative to any occurrence which, in the opinion of the Company, may create liability on the part of the Company under the terms of the policy. If the Company avails itself of such right and opportunity, the Insured and the Company shall cooperate in all respects so as to effect a final determination of the claim or claims. *Trial Exhibit 20, American Policy XLX 136-22-92, Conditions, ¶ 2.*

Concerning London Market Excess Policy 54362 *(Trial Exhibit 70)*, the ISLIC Policy XLX XSI 7030's *(Trial Exhibit 45)* "Notice of Loss" Provision from is incorporated. It states:

> Notice of an occurrence which appears likely to involve this policy shall be given by or on behalf of the insured to the company or any of its authorized agents as soon as practicable. The company at its own option may, but is not required to, participate in the investigation, settlement or defense of any claim or suit against the insured. *Trial Exhibit 45, ISLIC Policy XSI 7030, Part V – Conditions, "2. Notice of Loss: Participation in Defense by the Company."*

(c) "Occurrence" Definition

As Coverage Part "A" as defined in the underlying CNA Umbrella Policy RDU 3652850 *(Trial Exhibit 11)* applies to the asbestos claims at issue, London Market Excess Policy 53386 *(Trial Exhibit 67)*, incorporates the occurrence definition from the primary American Home Policy GLA 3432419 *(Trial Exhibit 5)*. It states:

> "Occurrence" means an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured. *Trial Exhibit 5, American Home Insurance Company Policy GLA 3432419, "Occurrence."*

(d) "Consent" and "Defense" Provisions

Concerning London Market Excess Policy 54362 *(Trial Exhibit 70)*, the following language from the ISLIC Policy XLX XSI 7030 (*Trial Exhibit 45*), is incorporated:

> The company at its own option may, but is not required to participate in the investigation, settlement or defense of any claim or suit against the insured. *Trial Exhibit 45, ISLIC Policy XSI 7030, Part V – Conditions, "2. Notice of Loss: Participation in Defense by the Company."*

Additionally, the following language from the underlying Integrity Insurance Company Policy XL 201746 *(Trial Exhibit 41)* is incorporated:

> The Insured shall be solely responsible for the investigation, settlement, defense and final disposition of any claim made or suit brought or proceeding instituted against the Insured to

> which this Policy would apply and which no underlying-insurer or insurers is obligated to defend. The Insured shall use due diligence and prudence to settle all such claims and suits which in the exercise of sound judgment should be settled, provided, however, that the Insured shall not make or agree to any settlement for any sum, in excess of the underlying insurance, without the approval of the Company. *Trial Exhibit 41, Integrity Insurance Company Policy XL 201746, Terms and Conditions, Notice of Loss, ¶ 9.*

Concerning London Market Excess Policy 53930 *(Trial Exhibit 69)*, the following language from the underlying American Insurance Company (Fireman's Fund) Policy XLX 136-22-92 *(Trial Exhibit 20)*, is incorporated:

> The Company shall not, however, be called upon-to-assume charge of the settlement or defense of any claims made, or suits brought, or proceedings instituted against the Insured, but shall have the right and opportunity to be associated with the Insured in the defense and trial of any such claims, suits or proceedings relative to any occurrence which, in the opinion of the Company, may create liability on the part of the Company under the terms of the policy. If the Company avails itself of such right and opportunity the Insured and the Company shall cooperate in all respects so as to effect a final determination of the claim or claims. *Trial Exhibit 20, American Insurance Policy XLX 136-22-92, "Notice of Occurrence."*

Concerning London Market Excess Policy 53386 *(Trial Exhibit 67)*, the Columbia Casualty (CNA) Umbrella Policy's RDU 3652850 *(Trial Exhibit 11)* "Settlement of

Claims or Suits" provision is not incorporated. This clause by its very terms applies to injuries under "Coverage B;" injuries sustained in this matter fall under "Coverage A."

j. Stonewall Insurance Company

A. Stonewall Insurance Company ("Stonewall") issued the following policies:

Policy Number	*Policy Period*	*Exhibit Number*
D11366	1/3/73 to 1/24/73	88
12173	12/31/73 to 12/31/75	87

B. The Stonewall "incorporation" provisions state:

> This Policy is subject to the same terms, definitions, exclusions and conditions (except as regards the premium, the amount and limits of liability and except as otherwise provided herein) as are contained in or as may be added to the Underlying Umbrella Policies stated in Item 2 of the Declarations prior to the happening of an occurrence for which claim is made hereunder: *Trial Exhibits 88 and 87, Stonewall Insurance Company Policies D11366 and 12173, Conditions, "2. Maintenance of Underlying Insurance."*

C. Except as identified below, Fuller-Austin has no other disputes regarding whether a particular provision is incorporated into the Stonewall Policies from any policy underlying the Stonewall Policies.

D. As to the controverted issues relating to incorporation/following form, the Court rules as follows:

(a) Concerning Stonewall Insurance Company Policy D11366 *(Trial Exhibit 88)*, the first sentence of the "Loss Payable" provision of the underlying Appalachian Insurance Umbrella Policy 71030 *(Trial Exhibit 9)*, is not incorporated. It states:

> Liability of the company with respect to any one occurrence shall not attach unless and until the insured, or the insured's underlying insurer, has paid the amount of the retained limit. *Trial Exhibit 9, Appalachian Insurance Umbrella Policy 71030 Conditions, ¶ H.*

However, the balance of the underlying Appalachian Insurance Umbrella Policy's "Loss Payable" provision is incorporated. It states:

> The Insured shall make a definite claim for any loss for which the company may be liable within twelve (12) months after the Insured shall have paid an amount of ultimate net loss in excess of the amount borne by the insured or after the insured's liability shall have been made certain by final judgment against the insured after actual trial, or by written agreement of the insured, the claimant, and the company. If any subsequent payments are made by the insured on account of the same occurrence, additional claims shall be made similarly from time to time and shall be payable within thirty (30) days after proof in conformity with this policy. Liability of the company with respect to any one occurrence shall not attach unless and until the insured, or the insured's underlying insurer, has paid the amount of the retained limit. *Trial Exhibit 9, Appalachian Insurance Umbrella Policy 71030 Conditions; ¶ H.*

(b) Concerning Stonewall Insurance Company Policy 12173 *(Trial Exhibit 87)*, the underlying Wausau Insurance Policies' No. 2225-03-030862 and 2226-00-030862 *(Trial Exhibits 108 and 109)* "Payment of Loss" provisions are not incorporated. Both provisions state:

> The company shall not be obligated to make any payment under this policy for any loss until the amounts not in excess of the retained limit have been paid by others. The company shall thereafter pay promptly all claims due under this policy. *Trial Exhibits 108 and 109, Wausau Insurance Company* (Policies') *No. 2225-03-030862 and 2226-00-030862, Conditions, "6. Payment of Loss."*

(c) Concerning Stonewall Insurance Company Policy 12173 (*Trial Exhibit 87*), the underlying Wausau Insurance Policies' No. 2225-03-030862 and 2226-00-03086 *(Trial Exhibits 108 and 109)* "Other Insurance With the Company" are incorporated. Both provisions state:

> If collectible insurance under any other policy issued by the company is available to the insured covering a loss also covered by this policy, the company's total liability under all such policies as respects such loss shall not exceed the greatest applicable limit of liability; provided, that this condition does not apply to insurance written by the company as underlying insurance or as insurance in excess of this policy. *Trial Exhibits 108 and 109. Wausau Insurance Company Policy Nos. 2225-03-030862 and 2226-00-030862, Conditions, ¶ 8.*

III. ISSUE #8 – METHOD OF EXHAUSTION

A. Overview of Dispute

Fuller-Austin contends that the Joint Defendants' policies are all on the risk (i) once the liability exceeds the amount of underlying liability insurance that is directly below the specific excess liability insurance policy, or (ii) once the immediate underlying liability insurance policies have been exhausted. Fuller-Austin's position sometimes is referred to as "vertical" exhaustion or attachment. The Joint Defendants contend that no umbrella or excess policies are on the risk until all underlying insurance, in all years, has been exhausted. The Joint Defendants' position is sometimes referred to as "horizontal layer-by-layer" exhaustion.

B. Overview of Horizontal and Vertical Exhaustion

Under the doctrine of horizontal exhaustion, "an excess or secondary policy does not cover a loss, nor does any duty to defend the insured arise, until all of the primary insurance has been exhausted." *Community Redevelopment Agency v. Aetna Cas. & Sur. Co.*, 50 Cal.App. 4th 329, 339 (1996). "Absent a provision in the excess policy specifically describing and limiting the underlying insurance, a horizontal exhaustion rule should be applied in continuous loss cases because it is most consistent with the principles enunciated in *Montrose* [*Montrose Chemical Corp. of California v. Admiral Insurance Co., 10 Cal.4th 645 (1995)*]." *Montgomery Ward & Co. v. Imperial Casualty and Indemnity Co.*, 81 Cal.App.4th 356, 365 (2000). In asbestos-related cases, California courts generally employ horizontal exhaustion to "spread" the claims across all relevant years in a layer-by-layer

basis. *Montgomery Ward & Co., supra*, 81 Cal.App.4th at p. 365.

Under the doctrine of vertical exhaustion, an excess policy is on the risk "when the limits of a specifically scheduled underlying policy is exhausted and the language of the excess policy provides that it shall be excess only to that specific underlying policy." *Community Redevelopment Agency, supra*, 50 Cal.App.4 at 339-40.

C. Applicable Rules of Exhaustion Analysis

Insurance policies, as contracts, must be interpreted according to the same rules that govern all contracts. *Bank of the West v. Superior Court*, 2 Cal.4th 1254, 1264 (1992). The basic rule is that contracts are to be interpreted according to the parties' mutual intent at the time of contracting. *Id; California Civil Code § 1636.* If the language of the contract is clear and explicit and does not involve an absurdity, *Civil Code § 1638* requires that "the language in a contract is to govern its interpretation." *Waller v. Truck Insurance Exchange*, 11 Cal.4th 1, 18 (1995).

Where courts have interpreted a term in an insurance policy, the judicial interpretation controls unless the parties specifically expressed a different intent at the time the contract was formed. *Collin v. American Empire Ins.*, 21 Cal.App.4th 787, 810 (1994); *Bartlome v. State Farm Fire & Cas. Co.*, 208 Cal.App.3d 1235, 1239 (1989). Thus, where courts have interpreted a policy term, evidence regarding its meaning is irrelevant, except evidence showing that, at the time of contracting, the specific parties intended a different meaning. *Id.*

The Court provisionally received certain evidence offered by plaintiff, subject to motions to strike. This provisional evidence was offered for "context" and in order to determine whether the mutual intent of the parties at the time of contracting was such that the plain language of the contracts, taken together with previous judicial interpretation of similar policies, should not control. *PG&E v. G. W. Thomas Drayage & Rigging Co.*, 69 Cal.2d 33, 39-40 (1968). When a party proffers its interpretation of a contract, the Court may give at least preliminary consideration to credible evidence offered by that party to support its proffered meaning in order to determine whether the contract language is reasonably susceptible to the meaning proffered by that party. The *Thomas Drayage* process was explained in *Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165, citing *Blumenfeld v. R. H. Macy & Co.* (1979) 92 Cal.App.3d 38, 45: "The decision whether to admit parole evidence involves a two-step process. First, the court provisionally received (without actually admitting) all credible evidence concerning the parties' intentions to determine 'ambiguity,' i.e. whether the language is 'reasonably susceptible' to the interpretation urged by a party." While the court may provisionally receive evidence of the parties' intentions as an initial step, if the extrinsic evidence offered is not probative of the mutual intentions of the parties at the time of contracting, it must ultimately be rejected, rather than admitted into, as evidence. *PG&E v. Thomas Drayage & Rigging Co.*, 69 Cal.2d 33, 39-40 (1968); Jefferson, *California Evidence Benchbook*, Third Ed., Vol.2, sections 32.14 and 32.23, pp. 676-681. That is the process this Court has followed.

D. Rulings On Issue #8.

Having heard the evidence, the Court finds that the evidence proffered by Fuller-Austin was not probative of the mutual intent of the parties to the contracts *at the time of contracting.* No evidence was offered which shows that the parties to these insurance contracts attributed a special meaning to the policies or had a specific intent at the time of contracting which would allow these policies to be interpreted in a way different than mandated by previous judicial interpretations.[1] Accordingly, the policy language, as interpreted by case law construing similar types of policies, controls.

Much of the extrinsic evidence offered by plaintiff was generated after the dispute arose and/or is subjective "expectation" evidence. Both such categories of evidence are irrelevant in interpreting contracts and, as set forth below, are inadmissible. *Fireman's Fund Ins. v. Fibreboard Corp.*, 182 Cal.App.3d 462, 469, n.3 (1986); *Wolf*

[1] The Court notes that there was undisputed testimony by various Insurers' underwriters that as a matter of custom and practice, when underwriting excess and umbrella policies, they look only at the underlying coverage in the year covered by the policy they are underwriting. They do not consider insurance purchased in previous years or that to be purchased in future years. Fuller-Austin asks the Court to conclude from that custom and practice of contemporary underwriters that the underwriters who actually underwrote the policies in question years ago intended that the policies would exhaust vertically. The Court is sympathetic to Fuller-Austin's point that it is anomalous that Insurers would calculate premiums on that basis and then expect the policies to exhaust horizontally. But there are certainly reasonable explanations for calculating premiums based only on the year in question, without regard to a particular method of exhaustion, not the least of which is the difficulty of calculating premiums based on an Insured's representations regarding its intent to purchase insurance in the future.

Machinery Co. v. Ins. Co. of North America, 133 Cal.App.3d 324, 328-329 (1982). However, even if the Court were to have admitted such evidence, it would not have changed the Court's determination that the policies are unambiguous as to Issue #8 and that the law as set forth herein should apply.

Upon review of the language of the applicable primary policies, this Court concludes that all of Fuller-Austin's applicable primary policies must be exhausted before any excess policy attaches. *Stonewall Ins. Co. v. City of Palos Verdes Estates*, 46 Cal.App.4th 1810, 1850 (1996). (Rulings concerning what "exhausted" means will be the subject of portions of Phase IB). See also, *Olympic Ins. Co. v. Employers Surplus Lines Ins. Co.*, 126 Cal.App.3d 593, 597 (1981), *Community Redevelopment Agency, supra*, 50 Cal.App.4th at p. 337; *California Civil Code § 1636, 1638.* Further, upon review of the language of the umbrella and excess policies, the Court further holds that the general principles of horizontal exhaustion apply at the excess layers as well. This is true despite Fuller-Austin's argument that some policy language refers only to the underlying policies in a given year. In those instances, additional policy language refers to exhaustion of other prior valid and collectable insurance before those excess policies are at the risk; such language supports the conclusion that these policies exhaust horizontally.

As stated in *Stonewall v. City of Palos Verdes Estates, supra*, horizontal exhaustion is most consistent with the continuing trigger under California law for continuing injury cases. Accordingly, the adoption of horizontal exhaustion in this instance means that Fuller-Austin must

prove individually as to each excess policy, that the limits of all applicable[2] underlying insurance are exhausted on a horizontal basis. Underlying insurance means all insurance at a lower level of attachment during the entire *horizontal* period. Since whether a policy has been exhausted is an issue reserved for a future phase of this trial, the Court, at this time, need only rule upon which method of exhaustion is appropriate. Based upon the aforementioned principles and the specific policy language, the Court adopts a horizontal method of exhaustion. *Stonewall Ins. Co. v. City of Palos Verdes Estates, supra*, 46 Cal.App.4th at p. 1850; *Olympic Ins., supra*, 126 Cal.App.3d 593, *Community Redevelopment Agency, supra*, 50 Cal.App.4th 329; *California Civil Code § 1636, 1638.*

IV. CONCLUSION

As this is a decision on one phase of a multi-phase case, no party is determined to be a prevailing party.

July 31, 2003

/s/ Judith C. Chirlin
JUDITH C. CHIRLIN

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[2] This ruling necessitates an analysis of the "occurrence" definitions in the policies, critical to determination of exhaustion issues in future phases of this case. The definitions of "occurrence" in the primary and excess policies fall within two categories. (For a detailed breakdown of these categories, see Appendix A, which is incorporated in full herein.)

The significance of the existence of the two categories can best be explained using an analogy suggested by the Joint Insurers. They likened horizontal exhaustion to the filling of a bathtub. That would be appropriate in this case if all of the policies contained the same definition of "occurrence." As set forth above, they do not. Because there are two different definitions of "occurrence" in the policies, a more appropriate analogy would be the filling of two bathtubs. The sequence, timing and method of filling the two bathtubs is left for another day.

Appendix A – Definitions of "Occurrence"

Upon review of the subject policies, the Court has found two definitions of occurrence. Policies either define one "occurrence" as exposure to substantially the same general conditions existing at or emanating from one premises location ("Definition Group A") or deem one "occurrence" as all damages arising out of such exposure to substantially the same general conditions, regardless of location ("Definition Group B"). Below are the findings of this Court.

Definition Group A

1966-1967

Excess Policy London Market Insurance Company's Policy CU 6499/CL 97099 (*Trial Exhibit 62*) definition of occurrence:

> The term "Occurrence" wherever used herein shall mean an accident or a happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury, property damage or advertising liability during the policy period. All such exposure to substantially the same general conditions existing at or emanating from one premises location shall be deemed one occurrence. *Trial Exhibit 62, London Market Insurance Company Policy CU 6499, Definitions, "Occurrence."*

1967-1968

Excess Policy London Market Insurance Company's Policy CU 8118/CL 98708 (*Trial Exhibit 64*) definition of occurrence:

> The term "Occurrence" wherever used herein shall mean an accident or a happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury, property damage or advertising liability during the policy period. All such exposure to substantially the same general conditions existing at or emanating from one premises location shall be deemed one occurrence. *Trial Exhibits 64, London Market Insurance Company Policy CU 8118/CL 98708, Definitions, "Occurrence."*

1969-1971

Excess London Market Insurance Company's Policies CU 10215 and CU 10216 (*Trial Exhibits 65 and 66*) definition of occurrence:

> The term "Occurrence" wherever used herein shall mean an accident or a happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury, property damage or advertising liability during the policy period. All such exposure to substantially the same general conditions existing at or emanating from one premises location shall be deemed one occurrence. *Trial Exhibits 65 and 66*, London Market Insurance Company Policies CU 10215 and CU 10216, Definitions, "Occurrence."

1979-1980

Holland-America Insurance Company Policy H-88260's (*Trial Exhibit 34*) definition of "occurrence":

> The term "Occurrence" wherever used herein shall mean an accident or a happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury, property damage or advertising liability during the policy period. All such exposure to substantially the same general conditions existing at or emanating from one premises location shall be deemed one occurrence. *Trial Exhibit 34, Holland-America Insurance Company Policy 88260. Section II; parag. 5 "Conditions."*

Following form policies which incorporate the aforementioned Holland-America definition of occurrence:

1st Layer Excess:

Lexington Insurance Company Policy 5514993; *Trial Exhibit 50*

Highlands Insurance Company Policy SR 20792; *Trial Exhibit 24*

2nd Layer Excess:

Integrity Insurance Company Policy XL 200624; *Trial Exhibit 40*

Lexington Insurance Company Policy 5514992; *Trial Exhibit 49*

The American Insurance Company (Fireman's Fund) Policy XLX 1362292; *Trial Exhibit 20*

3rd Layer Excess:

London Market Insurance Company Policy 53930; *Trial Exhibit 69*

1980-1981

Holland-America Insurance Company Policy H-88300 (*Trial Exhibit 35*) Definition of "occurrence":

> The term "Occurrence" wherever used herein shall mean an accident or a happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury, property damage or advertising liability during the policy period. All such exposure to substantially the same general conditions existing at or emanating from one premises location shall be deemed one occurrence. *Trial Exhibit 35, Holland-America Insurance Company Policy H-88300, Section II, parag. 5 "Conditions."*

Following form policies which incorporate the aforementioned Holland-America definition of occurrence:

1st Layer Excess:

Lexington Insurance Company Policy 5521799; *Trial Exhibit 51*

Highlands Insurance Company Policy SR 21089; *Trial Exhibit 25*

2nd Layer Excess:

Integrity Insurance Company Policy XL 201746; *Trial Exhibit 41*

Highlands Insurance Company Policy SR 21090; *Trial Exhibit 26*

Lexington Insurance Company Policy 5521800; *Trial Exhibit 52*

3rd Layer Excess:

International Surplus Lines Insurance Company (ISLIC) Policy XSI 7030; *Trial Exhibit 45*

4th Layer Excess:

London Market Insurance Company Policy 54362; *Trial Exhibit 70*

1981-1982

Holland-America Insurance Company Policy H-93688 (*Trial Exhibit 36*) definition of "occurrence":

> The term "Occurrence" wherever used herein shall mean an accident or a happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury, property damage or advertising liability during the policy period. All such exposure to substantially the same general conditions existing at or emanating from one premises location shall be deemed one occurrence. *Trial Exhibit 36, Holland-America Insurance Company Policy H-88300, Section III, parag. 5 "Conditions."*

Following form policies which incorporate the aforementioned Holland-America definition of occurrence:

1st Layer Excess:

Highlands Insurance Company Policy SR 21279; *Trial Exhibit 27*

Lexington Insurance Company Policy 5522463; *Trial Exhibit 54*

2nd Layer Excess:

Highlands Insurance Company Policy SR 21280; *Trial Exhibit 28*

Lexington Insurance Company Policy 5522463; *Trial Exhibit 54*

Integrity Insurance Company Policy XL 203282; *Trial Exhibit 42*

3rd Layer Excess:

CNA Insurance Company Policy 4170236; *Trial Exhibit 12*

4th Layer Excess:

Federal Insurance Company policy 79357205; *Trial Exhibit 16*

1982-1984

Mission National Insurance Company Policy MN 009859 (*Trial Exhibit 71*) definition of occurrence:

> The term "Occurrence" whenever used herein shall mean an accident or a happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury, property damage or advertising liability during the policy period. All such exposure to substantially the same general conditions existing

from one premises location shall be deemed one occurrence. *Trial Exhibit 71.*

Mission National Insurance Company Policy MN 009859, Definitions, "Occurrence."

Following form policies which incorporate the aforementioned Mission National definition of occurrence:

1982-1983

1st Layer Excess:

National Union Insurance Company Policy 9600317, *Trial Exhibit 80*

Highlands Insurance Company Policy SR 21524, *Trial Exhibit 29*

2nd Layer Excess:

National Union Insurance Company Policy 9600316, *Trial Exhibit 79*

Highlands Insurance Company Policy SR 21525, *Trial Exhibit 30*

Integrity Insurance Company Policy XL 206329, *Trial Exhibit 43*

3rd Layer Excess:

Federal Insurance Company Policy (83)7935-72-05, *Trial Exhibit 17*

Transcontinental Insurance Company ("CNA") Policy RDX 009616553, *Trial Exhibit 89*

1983-1984

1st Layer Excess:

New England Insurance Company (Hartford) Policy 791331, *Trial Exhibit 82*

2nd Layer Excess:

Twin City Fire Insurance Company (Hartford) Policy TXS 102899, *Trial Exhibit 92*

3rd Layer Excess:

Highlands Insurance Company Policy 21833, *Trial Exhibit 31*

4th Layer Excess:

Federal Insurance Company Policy (84)7935-72-05, *Trial Exhibit 18*

Transcontinental Insurance Company ("CNA") Policy RDX 009616577, *Trial Exhibit 90*

1984-1985

Mission National Insurance Company Policy MN 034643 (*Trial Exhibit 72*) definition of occurrence:

> The term "Occurrence" whenever used herein shall mean an accident or a happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury, property damage or advertising liability during the policy period. All such exposure to substantially the same general conditions existing from one premises location shall be deemed one occurrence. *Trial Exhibit 72,*

Mission National Insurance Company Policy MN 03643, Definitions, "Occurrence."

Following form policies which incorporate the aforementioned Mission National definition of occurrence:

1st Layer Excess:

Integrity Insurance Company Policy XL 208532, *Trial Exhibit 44*

2nd Layer Excess:

Chicago Insurance Company Policy 255U-0037285, *Trial Exhibit 10*

Highlands Insurance Company Policy 22207, *Trial Exhibit 32*

3rd Layer Excess:

Federal Insurance Company Policy (85)7935-72-05, *Trial Exhibit 19*

Transcontinental Insurance Company ("CNA") Policy RDX 009616705, *Trial Exhibit 91*

Definition Group B

1972-1975

Appalachian Insurance Company Policy 71030 (*Trial Exhibit 9*), Lake Charles Coverage, definition of occurrence:

> With respect to [personal injury and property damage coverage] "occurrence" means either an accident happening during the policy period or a continuous or repeated exposure to conditions which unexpectedly and unintentionally causes injury to persons or

> tangible property during the policy period. All damages arising out of such exposure to substantially the same general conditions shall be considered as arising out of one occurrence. *Trial Exhibit 9, Appalachian Insurance Company Policy 71030, Conditions, "Other Definitions," "Occurrence."*

Following form policies which incorporate the aforementioned Appalachian definition of occurrence:

1st Layer Excess:

> Stonewall Insurance Company Policy D11366, *Trial Exhibit 88,* 1973-1973

1974-1975

Wausau Insurance Company Policy 225-0303-0862's (*Trial Exhibit 108*) definition of "occurrence:"

> "Occurrence" means an accident including continuous or repeated exposure to condition which results, during the policy period, in personal injury, property damage or advertizing injury neither expected nor intended from the standpoint of the insured. . . . All such personal injury, property damage or advertizing injury caused by one event or by continuous or repeated exposure to substantially the same conditions shall be deemed to result from one occurrence . . . *Trial Exhibit 108. Wausau Insurance Company Policy 225-0303-0862, Definitions, "Occurrence."*

Following form policy which incorporates the aforementioned Wausau definition of occurrence into its own similar, but not inconsistent, definition of occurrence:

1st Layer Excess:

> Stonewall Insurance Company Policy 12173; *Trial Exhibit 87,* See Definitions (a)."

1975-1976

Wausau Insurance company Policy 2226 00 030862 (*Trial Exhibit 109*) definition of "occurrence:"

> "Occurrence" means an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured . . . *Trial Exhibit 109, Wausau Insurance Company Policy 2226 00 030862,*
>
> *Definitions, "Occurrence."*

Following form policy which incorporates the aforementioned Wausau definition of occurrence into its own similar, but not inconsistent, definition of occurrence:

1st Layer Excess:

> Stonewall Insurance Company Policy 12173; *Trial Exhibit 87,* See "Definitions (a)."

1976-1977

Wausau Insurance Company Policy 2226 03 030862 (*Trial Exhibit 110*) definition of "occurrence:"

> "Occurrence" means an accident, including continuous or repeated exposure to conditions, which results in personal injury or property damage neither expected nor intended from the standpoint of the insured . . . *Trial Exhibit 110, Wausau Insurance Company Policy 2226 03 030862, Definitions, "Occurrence."*

Following form policies which incorporate the aforementioned Wausau definition of occurrence into its own definition of occurrence:

1st Layer Excess:

London Market Company Policy 53086, *Trial Exhibit 61*

2nd Layer Excess:

Lexington Insurance Company Policy GC 5503577, *Trial Exhibit 36*

Northbrook Insurance Company Policy 63001616, *Trial Exhibit 1*

American Home Assurance Company Policy CE 338 0697, *Trial Exhibit 4*

1977-1978

American Home Policy GLA 3432419 (*Trial Exhibit 5*) definition of "occurrence."

> "Occurrence" means an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured. *Trial Exhibit 5, American Home Insurance Company Policy GLA 3432419, "Occurrence."*

Following form policies which incorporate aforementioned American Home definition of occurrence:

1st Layer Excess:

First State Insurance Company Policy 924273, *Trial Exhibit 21*

London Market Insurance Company Policy 53386, *Trial Exhibit 67*

2nd Layer Excess:

Lexington Insurance Company Policy 5502322, *Trial Exhibit 47*

National Union Fire Insurance Company Policy 1189498, *Trial Exhibit 73*

Northbrook Insurance Company Policy 63002718, *Trial Exhibit 2*

Home Insurance Company Policy HEC 9006863, *Trial Exhibit 37*

1978-1979

INSCO Insurance Company Policy CBC 1239 (*Trial Exhibit 39*) definition of "occurrence":

> With respect to Personal Injury and Property Damage, the term "Occurrence" means an event, including continuous or repeated exposure to conditions, which result in Personal Injury or Property Damage during the policy period neither expected nor intended from the standpoint of the Insured. All Personal Injury or Property Damage arising out of the continuous or repeated exposure to substantially the same general condition shall be considered as arising out of one occurrence. *Trial Exhibit 39, INSCO Insurance Company Policy CBC 1239, Definitions, "Occurrence."*

Following form policies which incorporate aforementioned Wausau definition of occurrence:

1st Layer Excess:

Holland-America Insurance Company Policy H-84893, *Trial Exhibit 33*

2nd Layer Excess:

Highlands Insurance Company Policy SR 20550, *Trial Exhibit* 22

London Market Insurance Company Policy 53658/62739; *Trial Exhibit 68*

3rd Layer Excess:

Highlands Insurance Company Policy SR 20556, *Trial Exhibit* 23

Lexington Insurance Company Policy 5510568, *Trial Exhibit 48*

National Union Insurance Company Policy 1185472, *Trial Exhibit 74*

Northbrook (Allstate Insurance Company) Policy 630043032; *Trial Exhibit 3*

* * *

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

FULLER-AUSTIN INSULATION COMPANY, *Plaintiff,* vs. FIREMAN'S FUND INSURANCE COMPANY, *et al.*, *Defendants.*	CASE NO. BC 116835 Honorable Judith C. Chirlin Department 89 STATEMENT OF DECISION AS TO PHASE IB, ISSUES 2-7 AND 9 Trial Date: September 10, 2001 (Filed Aug. 6, 2002)

I. INTRODUCTION

Fuller-Austin Insulation Company ("Fuller-Austin") brought this declaratory relief action to establish the obligations of defendant insurance companies, under various comprehensive general liability, umbrella and excess insurance policies issued between 1944 and 1985. The underlying claims allege bodily injury arising out of exposure to asbestos-containing products installed or removed by Fuller-Austin.

The original defendants were the solvent insurance companies that sold primary, umbrella and excess insurance policies to either Fuller-Austin or Dynalectron (later known as DynCorp). During the course of this action, Fuller-Austin settled its insurance disputes with all of its primary insurance companies and some of its umbrella and excess insurance companies, and dismissed these defendants from the action. There were no objections to the dismissals, and no cross-claims were filed by or among Joint Defendants. The remaining Joint Defendants are: The

American Insurance Company (Fireman's Fund Insurance Company), Chicago Insurance Company, Columbia Casualty Company, Federal Insurance Company, First State Insurance Company, Highlands Insurance Company, The Home Insurance Company, International Insurance Company, Certain Syndicates at Lloyd's, London and Certain Market Insurer Companies (collectively, "London Market"), New England Reinsurance Corporation, Stonewall Insurance Company, Twin City Insurance Company, and Transcontinental Insurance Company.

A. Order of Trial

The Court ordered that Phase I of the trial consist of nine legal issues for the Court's determination. Trial of legal Issues # 1-9 was first recommended by Judge Frederick Lower and adopted by the Court on December 1, 2000. As framed, these issues are either questions of law or interpretations of insurance contracts, and are properly tried to the Court. *Parsons v. Bristol Development Co.*, 62 Cal.2d 861, 865, 44 Cal.Rptr. 767, 402 P.2d 839 (1965).

In December 2000, a bench trial – referred to by the parties as the Phase IA trial – was held on the following two issues:

Incorporation: The resolution of disputes concerning (a) the content of policies, and (b) the incorporation of lower level policy language into upper level policies, *i.e.*, what language in lower level policies is relevant and what language is to be incorporated.

Exhaustion: What method of exhaustion is appropriate in this case; exhaustion of immediately

underlying policies or exhaustion of all underlying insurance, in any years, *i.e.*, horizontal or vertical exhaustion?

On July 20, 2001, the Court issued its Statement of Decision on these two issues.[1] Following the close of Phase IA, the Court set trial on the remaining seven legal issues, designated Phase IB. Those seven issues are:

Issue No. 2 – "*Paid or Held Liable to Pay.*" What is the legal effect of policy language that requires the underlying carrier to "have paid or have been held legally liable to pay the full amount of their respective limits of liability" before an excess carrier's obligation arises.

(a) Is actual payment in cash, in full, or at all, required before an excess carrier's obligations are triggered?

(b) Does payment of underlying limits to the insured rather than to third party claimants constitute exhaustion?

(c) Does installment payments of underlying limits to the insured constitute exhaustion?

(d) Does an underlying insurer's assertion of exhaustion, contested by the insured, constitute exhaustion?

(e) Does an insured's assertion that its underlying coverage has been exhausted establish the fact of exhaustion binding upon its excess insurers?

[1] In a prior ruling, the Court determined that California law would apply to all of the insurance contracts except the London Market policies sold to Fuller-Austin with regard to the Cities Services facility. As to these Cities Services policies, the Court determined that Louisiana law would apply.

Issue No. 3 – *Excess Policy Triggers*. Are any of the parties at issue here triggered if Fuller-Austin's "liabilities" exceed the policies' attachment points?

(a) What "liabilities" are to be considered?

(b) Are there critical dates for determining "liabilities?" If so, what are those dates?

Issue No. 4 – *Trigger Dates*. Are there critical dates or events for determining if excess insurers' obligations have been triggered? If so, what are those dates?

Issue No. 5 – *Exhaustion As A Matter of Law*. Has exhaustion occurred as a matter of law because of the ruling in *Phoenix Ins. Co. v. U.S. Fire Ins. Co.*, 189 Cal.App.3d 1511, 235 Cal.Rptr. 185 (1987)?

Issue No. 6 – *"Drop Down."* What is the legal effect of "drop down" provisions in "excess" policies or in "umbrella" policies?

Issue No. 7 – *Impact of Insolvencies*. What is the legal effect of insolvencies of underlying insurers?

Issue No. 9 – *Trigger of Coverage*. Under California and/or Louisiana law do the Joint Defendants' policies respond on a "continuous trigger" basis?

The Phase IB trial commenced on September 10, 2001. Closing arguments were heard on December 11-12, 2001. Phase IB is the subject of this Statement of Decision.

B. Evidentiary and Procedural Stipulations Re: Phase IB

The parties entered into several stipulations, as follows:

Policy Stipulations: Trial Exhibits 1 through 110 are copies of the insurance policies at issue, including those sold by insolvent insurance companies that were not in the case and those sold by insurance companies who have settled. The parties stipulated that they would not object to the introduction at trial of Exhibits 1-110, the policies, all as are more fully listed in the Stipulation Regarding Insurance Policies signed by the parties during Phase IA.

The General of "First Wave" Document Stipulations # 1-4 were pretrial agreements wherein Fuller-Austin waived certain evidentiary objections to four categories of documents produced as a result of Joint Defendants' Motions to Compel filed in 1999. These four stipulations were signed by the parties during Phase IA and are part of the Court's files.

The "Third Wave" Document Stipulation was a pretrial agreement wherein the parties agreed solely for purposes of and use in Phase IB to waive certain evidentiary objections to thousands of documents produced in this matter. This stipulation was signed by the parties prior to commencement of the Phase IB trial and is part of the Court's files.

The Stipulation of Expected Testimony of Joszef Schwager was a pretrial agreement between Fuller-Austin and counsel for First State Insurance Company, New England Reinsurance Company and Twin City Insurance Company setting forth stipulated testimony of Joszef Schwager who was 2025(d)(6) designee for First State, New England Reinsurance and Twin City on the two topics set forth in the Notices of Deposition, dated February 4, 1999.

The Stipulation Re Conduct of Phase IB was a pretrial agreement between Fuller-Austin and Joint Defendants setting forth, among other things, that the continuous trigger for asbestos bodily injury insurance coverage set forth in *Armstrong World Industries v. Aetna Cas. & Sur. Co.*, 45 Cal. App. 4th 1, 52 Cal.Rptr.2d 690 (1996) is controlling as to all of the insurance policies that are subject to California law.

The Stipulation Re Scope of Testimony of Elizabeth Warren was a pretrial agreement between Fuller-Austin and Joint Defendants setting forth, in general terms, the scope of the expected testimony from Plaintiff's Bankruptcy Expert, Professor Warren. The stipulation also reserved the parties' rights to object to testimony falling outside the scope of the agreed areas.

II. BANKRUPTCY OF FULLER-AUSTIN

While this case was in the pre-trial stages, on September 4, 1998, Fuller-Austin filed for bankruptcy protection in Delaware, under Section 524(g) of the Bankruptcy Code. On that date, Fuller-Austin submitted to the United States District Court, Honorable Joseph J. Farnan, (sitting in Bankruptcy) presiding, a "pre-packaged" bankruptcy plan ("Plan") pursuant to *11 U.S.C. § 524(g)*. Notice of the hearing on the confirmation of the Plan was given on or about September 16, 1998; various insurers filed objections to the Plan on October 9, 1998. The hearing on the confirmation of the Plan and a hearing on the issue of the insurers' standing to object was held on October 15, 1998. On November 10, 1998, the U.S. District Court held that the objecting insurers had no pecuniary interest in the Plan and, accordingly, the insurers did not have

standing to object to the Plan.[2] *See Trial Exhibit 544 – Order re: Standing of Insurers.* On November 13, 1998, the U.S. District Court issued its Order Confirming the Plan[3] and, consequently, on December 11, 1998, the Fuller-Austin Settlement Trust ("Trust" or "FAST") became effective. *See 11 U.S.C. § 524(g)(2)(B).*

Throughout the pretrial proceedings after November 13, 1998, and in this trial, the parties vigorously disputed the nature of the bankruptcy proceedings and the orders entered by Judge Farnan as well as their effect on this case. Plaintiff contends that the Order Confirming the Plan established Fuller-Austin's liabilities to the asbestos claimants. It further contends that the Plan as proposed by it contained the aggregate value of pending and future claims, but upon objection of the Joint Defendants, the aggregate value provision was removed from the Plan, leaving such determination to be made in this litigation under California law. The Defendants claim that in denying standing to them, Judge Farnan repeatedly assured them that nothing he did in the bankruptcy case would affect their right to litigate the coverage issues. Thus they argue that the bankruptcy proceedings and the order have no effect on them.[4]

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[2] No insurance company appealed this decision

[3] The bankruptcy court must make thirteen specific, independent findings before confirming a proposed plan. *See 11 U.S.C. § 112(A).* Such findings including that the proposed plan: is in good faith, conforms to the bankruptcy code, and is feasible. The bankruptcy courts findings are binding on the debtor and all claimants against the estate (both as to the liability of the debtor or non-liability and the dollar amount fixed). *See Warren Trial Testimony, September 14, 2001, p. 48-49.*

[4] Defendant Insurers also cite the decision of the California Supreme Court in *Certain Underwriters at Lloyd's of London v. Superior*

(Continued on following page)

Each side called a witness with bankruptcy expertise.[5] Plaintiff called Professor Elizabeth Warren of the Harvard Law School; Defendants called Judge Herbert Katz, a retired Bankruptcy Judge. In what turned out to be largely tutorials, the experts discussed bankruptcy law in general and *11 U.S.C. § 524(g)*, the legislative history and the purposes thereof, in particular. They also discussed their views as to whether or not the Fuller-Austin Bankruptcy Plan met the legislative criteria set out in § 524(g).[6]

Court ("Powerine"). 24 Cal. 4th 945 (2001), wherein the Court held that " . . . the insurer's duty to indemnify the insured for 'all sums that the insured becomes legally obligated to pay as damages' is limited to money ordered by a court." They argue in essence that Fuller-Austin's obligations under the Bankruptcy Plan, even though entered by order of a United States District Court with extensive findings as required under the Bankruptcy Code, are not "damages[,] . . . money ordered by a court." Rather, they argue that the fact that the Plan was "prepackaged" means that it was a settlement to which they did not agree, and therefore, under *Powerine*, they have no duty to indemnify Fuller-Austin for any liabilities dealt with by the Bankruptcy Plan. For reasons set forth *infra*, this Court rejects that argument.

[5] During the pretrial proceedings, the Court and counsel discussed whether or not it was appropriate to call Bankruptcy "experts" *per se*, as the determinations to be made were primarily legal in nature and thus the province of the Court. The Court permitted, indeed encouraged, the parties to call the witnesses, with the observation that if some of their testimony ultimately proved to be inadmissable legal conclusions, the rest would be considered as a "tutorial" on a subject with which the Court has had limited experience.

[6] As testified to by Professor Warren and confirmed by Judge Katz, § 524(g) was enacted to deal with unique bankruptcy related problems in the context of asbestos mass tort litigation. Traditional bankruptcy concepts require, simplistically stated, that the debts of a bankrupt be listed and the assets marshaled. Then the assets are divided up pro-rata among the creditors or classes of creditors, in a fashion consistent with legislatively established priorities, the goals of which are to equalize asset distribution among similarly situated creditors. That procedure obviously contemplates that creditors be identified either

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Based on the evidence presented, the law and the arguments of counsel, the Court concludes that the confirmed Bankruptcy Plan ("Plan") served to establish Fuller-Austin's liability for asbestos-related injuries, the quantum of damages to which each asbestos victim is legally entitled, and the procedure for satisfying the liability. *11 U.S.C. § 524(g)*. Fuller-Austin's "prepackaged" Plan was brought and confirmed under *11 U.S.C. § 524(g)*. Bankruptcy section, *11 U.S.C. § 524(g)*, was specifically drafted and designed to deal with *pending and future* claims in mass asbestos tort cases.[7] *11 U.S.C. § 524(g)(2)(B)(i)(I) and (II)*; *also see Warren Trial Testimony, September 14, pp. 72-74*. Section 524(g), in conjunction with other bankruptcy provisions, provides framework for (i) resolving all present and future liabilities of a debtor, (ii) establishing the amount of the debtor's liability and the value of each claimant's claim in lawful

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before or during the pendency of the bankruptcy proceedings. In the context of asbestos, that is not possible due to the latency period between exposure to asbestos and the manifestation of its ill effects. In the case of mesothelioma, for example, it is recognized that the latency period can be as much as 40 years. As such, people exposed to asbestos in 1980 may not suffer any effects from it until 2020. Thus, if all assets of a bankrupt are marshaled and distributed in 2000, the mesothelioma sufferer whose illness does not manifest itself until 2020 receives nothing, while a person similarly situated whose disease manifested itself in 1995 receives a recovery. One of the purposes of 524(g) was to establish a procedure that would enhance the likelihood that future claimants (people already exposed, but whose illness has not yet manifested itself) would be treated equally with present claimants. This is precisely the problem that confronted Fuller-Austin.

[7] As stated by Professor Elizabeth Warren, *11 U.S.C. § 524(g)* was intended to "level the playing field" between pending and future claimants by assessing the same monetary value for present and future claims, and thus, assuring that funds will be available for future claimants.

U.S. currency, (iii) protecting present claims and future contingent claims and demands by appointing separate legal representatives for the present and future claimants, (iv) setting up a trust to pay all present and future asbestos claims and demands in a like manner, and, (v) creating an injunction barring any further legal action with respect to the asbestos claims and demands resolved in bankruptcy. *11 U.S.C. § 524(g).*

As part of the reorganization process under *11 U.S.C. § 524(g)*, Fuller-Austin Settlement Trust (the "Trust") was established. Pursuant to applicable statutory language, the Trust assumed the liabilities (pending and future claims for asbestos-related injuries) of Fuller-Austin and Dyncorp at the time of the entry of the order for relief and, among other mandates, is required to use its assets to pay claims and demands. *11 U.S.C. § 524(g)(2)(B)(i)(I) and (IV).* Based upon the Plan, the Trust is structured to operate through mechanisms (*e.g.* matrices) which are designed to provide reasonable assurances that the Trust will be in a financial position to pay present claims and future demands that involve similar claims in substantially the same manner. *11 U.S.C. § 524(g)(2)(B)(ii)(V); see Warren Trial Testimony, September 14, 2001, p. 81.*[8]

Fuller-Austin's legal obligations to the asbestos claimants and the insurance companies' contractual

[8] Defendants argue that the Trust's claims procedures – which are considerably less cumbersome than traditional claims procedures or than litigation – results in the possibility of payments without legally sufficient proof of the claims. But the very purpose of such a trust is to "minimize the amount of money paid on distribution, the administrative part, the overhead part, and to maximize the amount that can be put in the hands of the actual victims." *Warren Trial Testimony, September 14, 2001, p. 82.*

obligations to Fuller-Austin were not diminished solely because of Fuller-Austin's bankruptcy. *California Insurance Code § 11580; Webster v. Sup. Court*, 46 Cal.3d 338, 347-48 (1988). All the insurance policies in effect provide that the "bankruptcy" of the insured shall not affect the insuring obligations. For example, each policy contains the following provision:

> In the event of the bankruptcy or insolvency of the Insured, the Company shall not be relieved thereby of the payment of any claims hereunder because of such bankruptcy or insolvency.[9]

Once the Plan was confirmed, Fuller-Austin became legally obligated to pay all pending and future asbestos claimants.

Consequently, now that Fuller-Austin's liability has been established, Joint Defendants policies are implicated and they are required to pay "all sums" for each allowed claim – the allowed liquidated value or some higher value established through arbitration or trial, subject to the terms of the policies. Additionally, Joint Defendants are required to pay the aggregate value of Fuller-Austin's asbestos liability to the extent that these damages can be ascertained.[10] Whether the amount of these pending and

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[9] Such language is required in all policies pursuant to *Ins. Code § 11580.*

[10] This concept should not come as a surprise to Joint Defendants since estimating the aggregate value of pending and future claims is provided for under *§ 524(g)*. Defendants' reliance on the language in §524(g) that "the actual amounts, numbers and timing of . . . future demands cannot be determined" is not inconsistent with the estimation process. Section §524(g)(2)(B)(ii)(V) specifically provides for the "estimates of the numbers and values of present claims and future demands," and such an estimation is also required under §502(c).

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future claims can be calculated with reasonable certainty is an issue for the jury in the next trial phase.

III. ISSUE # 9 – TRIGGER OF COVERAGE

A. Overview of Dispute

The parties have stipulated that as to those insurance policies subject to California law (all policies except for the Cities Services policies issued by London Market) the continuous trigger of coverage for asbestos bodily injury claims set forth in *Armstrong World Industries v. Aetna Cas. & Sur. Co.*, 45 Cal.App.4th 1, 52 Cal.Rptr.2d 690 (1996) is controlling. As to the Cities Services policies subject to Louisiana law, Fuller-Austin contends that Louisiana law allows for the application of the continuous trigger where it will maximize coverage. *Cole v. Celotex Corp.*, 599 So.2d 1058, 1077, 1086 (La. 1992). The London Market defendants, on the other hand, contend that *Cole* mandates an exposure trigger.

Only two defendants, Columbia Casualty Company and Transcontinental Insurance Company (collectively, "CNA"), contend that their policies respond only to injuries that incept during a policy period pursuant to the language contained in the Endorsement No. 7. CNA insists that under Endorsement No. 7, only losses due to injury or

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Courts have recognized the ability to make such estimations accurately. *In re Johns-Manville Corp.*, 830 F.Supp. 686 (S.D.N.Y. 1993); *In re Eagle Picher*, 189 B.R. 681 (1995). As set forth above, Joint Defendants objected to the aggregate value provisions contained with the Plan. As a result, Fuller-Austin withdrew the aggregate value provisions in order for such a determination be made under California law. This determination will be made in Phase II.

destruction occurring after the inception date of the policy and not before, apply to reduce the underlying limits.

Yet Fuller-Austin argues the Endorsement No. 7 provision is designed to ensure that if CNA's policy is non-concurrent with the underlying policy, the injuries or damages that exhaust the underlying policy must also fall within CNA's policy. Under the continuous trigger, and based on the fact that all of the underlying CNA policies were concurrent at the time the policies were sold, Fuller-Austin maintains that the underlying policies necessarily provide coverage that would fall within the time parameters of the CNA policy. Additionally, Fuller-Austin specifically notes that the Court ruled, on summary judgment, that CNA's Endorsement No. 7 provision (and related provisions) was ambiguous. *See Order Denying CNA's Motion for Summary Adjudication of Issues Re No Present Duty to Indemnify dated December 22, 1999.*

The Cities Services policies issued by London Market cover a specific location. Fuller-Austin contends that, to the extent these policies are triggered by Cities Services asbestos claims, the policies respond in full and London Market has no rights to "other insurance." This position is referred to as the "specific versus general" argument. London Market disputes Fuller-Austin's position.

B. Overview of Trigger of Coverage

The continuous trigger of coverage for progressive injury and damage claims was adopted by the California Supreme Court in *Montrose Chemical Corp. of Calif. v. Admiral Ins. Co.*, 10 Cal.4th 645, 689, 42 Cal.Rptr.2d 324, 913 P.2d 878 (1985), which held that "where . . . successive CGL policy periods are implicated, bodily injury and

property damage which is continuous or progressively deteriorating through several policy periods is potentially covered by all policies in effect during those periods." *See also*, Croskey, Kaufman, *et al.*, CAL. PRAC. GUIDE: INSURANCE LITIGATION (The Rutter Group 2000) ("Cal.Prac.Guide"), ¶ 7:175. The continuous trigger has been applied consistently in dealing with progressive injury cases, such as asbestos. In *Armstrong*, the First District Court of Appeal applied the "continuous trigger" of coverage to asbestos bodily injury claims similar to the ones presented here, holding:

> It bears emphasizing that whether there is coverage for 'bodily injury' is not the question here; it is undisputed that the CGL policies provide coverage for the asbestos-related injuries suffered by the claimants. The question before this court is when the injuries occurred. . . . [T]he trial court's factual findings here, made after consideration of extensive medical testimony, amply support the conclusion that injury actually occurs upon exposure and continues until death. We therefore find *no error* in the trial court's adoption of a continuous trigger. (See also *Stonewall Ins. Co. v. Asbestos Claims Management, supra*, 73 F.3d 1178, 1196-1197; *Owens-Illinois, Inc. v. United Ins. Co.* (1994) 138 N.J. 437 [650 A.2d 974, 955]; *J.H. France Refractories v. Allstate* (1993) 534 Pa. 29, A.2d 502, 506-507].)

Armstrong, 45 Cal.App.4th at 47, 52 Cal.Rptr.2d 690.

The continuous trigger is based, in part, on the "all sums" language (or its "ultimate net loss" equivalent) found in general liability policies. This language obligates "the insurers to pay on behalf of a policyholder 'all sums' that the policyholder becomes legally obligated to pay as

damages because of bodily injury during the policy period," and consistently has been interpreted to preclude requiring the policyholder to pay for periods where the policyholder is uninsured or insurance coverage is unavailable. *Armstrong*, 45 Cal.App.4th at 57, 52 Cal.Rptr.2d 690. ("It is irrelevant that only part of the asbestos-related disease developed during any single policy period or during a period in which the manufacturer had no insurance. The logical consequence of this ruling is that the policyholder is covered (up to the policy limits) for the full extent of its liability and need not pay a pro rata share.").

The Supreme Court of Louisiana adopted an "exposure" trigger of coverage in an asbestos insurance coverage case. *Cole*, 599 So.2d at 1086. Under the exposure trigger, the policies in effect during the period in which a claimant was exposed are triggered. It should be noted that in the concurring opinion issued in that case, one justice opined that the Court did not consider the continuous trigger because under the facts of the case it would not have made any substantive difference. The concurring opinion went on to note that in order to fulfill Louisiana's guiding principle of maximizing coverage, the continuous trigger could be applied in a future case. The Court is aware of no Louisiana case either adopting or rejecting the possible application of the continuous trigger.

C. Court's Ruling on Trigger of Coverage

The Court concludes that the continuous trigger should apply to all of the insurance policies, including those sold by the London Market for the Cities Services site and those sold by CNA containing the Endorsement No. 7 language.

As to the London Market Cities Services policies, the Court determines that a continuous trigger will fulfill Louisiana's stated policy of maximizing insurance coverage under the circumstances presented by Fuller-Austin. Additionally, the Court finds that Cities Services policies are "specific policies" and that they must respond immediately to Cities Services asbestos claims, and are not entitled to the benefit of "other insurance" provided by general policies covering the same claims. Under Louisiana law, a policy covering a specific risk is considered primary to a policy covering general risks. *Fasullo v. American Druggists' Insurance*, 262 So.2d 810 (La. 1972). Where both a specific and general policy cover the same risk, the "rule appears to be that the 'specific' policy must bear the entire loss up to its policy limits; the 'general' or 'blanket' policy is treated as excess insurance so that its coverage does not attach until the 'specific' insurance has been exhausted." *Id.*, at 815. As the *Fasullo* court held:

> the specific policy must bear the entire loss on the portion of the premises which it covers up to its face amount, with the blanket policy or policies affording residual or excess coverage to the extent of their respective limits of liability. *Id.*, at p. 815; *see also*, 16 Couch on Insurance (2d) 507 Sec. 62:59.

This specific-over-general rule has particular application to the Cities Services policies, which are specific to a particular location. Applying Louisiana law, these specific policies respond to a loss arising out of Cities Services before any other Fuller-Austin general policies.

As for CNA, the inception trigger that CNA advances is not supported by the policy language, the case law, or the continuous trigger approach to progressive injury

cases. Furthermore, the Court previously has ruled that the Endorsement No. 7 language (and similar such language found in other CNA policies) is ambiguous. The Court finds that the interpretation given by Fuller-Austin is reasonable and, therefore, adopts Fuller-Austin's interpretation. *Safeco Ins. Co. v. Robert S.*, 26 Cal.4th 758, 763, 110 Cal.Rptr.2d 844, 28 P.3d 889 (2001) ("ambiguous terms are resolved in the insureds' favor, consistent with the insureds' reasonable expectations"). Fuller-Austin's interpretation is reasonable under the circumstances and is consistent with the testimony provided by CNA's witnesses, Pamela Gillette and Dean Theos, and CNA's own internal documentation, which referred to this provision as a non-currency provision with limited application. Trial Exh. 1869 ("Instructions for Use: This endorsement is mandatory and is designed to restrict the coverage contained in the policy form when there is a non-currency situation.").

Accordingly, consistent with the holdings in *Montrose* and *Armstrong*, the Court will adopt the continuous trigger, as follows:

1. All of Fuller-Austin's policies that were in effect from the date of first exposure to any asbestos or asbestos-containing product until the date of death or claim, whichever occurs first, are triggered with respect to an asbestos bodily injury claim. This trigger applies regardless of the nature of the asbestos-related injury or disease alleged by a claimant.

2. Each triggered policy has an independent obligation to pay in full up to policy limits any indemnity costs on an asbestos bodily injury claim and, if the policy contains a defense obligation, to pay in full any defense costs

on the claim. Fuller-Austin is not required to share in the indemnity or defense costs of a claim based upon any uninsured or self-insured periods of time.

3. With respect to the London Market Cities Services policies, the policies are "specific policies" that they must respond first to Cities Services asbestos claims, and are not entitled to the benefit of "other insurance" provided by general policies covering the same claims.

III. ISSUE NO. 7 – IMPACT OF INSOLVENCIES

A. Overview of Dispute

The parties dispute the impact of insolvent insurance companies in the Fuller-Austin program. Fuller-Austin's position is that asbestos losses are not allocable to insolvent policies pursuant to "other insurance" provisions. Fuller-Austin notes that the term "other insurance" is separate and distinct from the term "underlying insurance," as these terms are used in the insurance policies. Since insolvent insurance is uncollectible, it is not factored into the amount of available "other insurance."

In some aspects, Joint Defendants agree with Fuller-Austin. The Joint Defendants acknowledge that, where there are both solvent and insolvent insurance policies at the same layer of coverage in the Fuller-Austin program, there can be no allocation of an asbestos loss to the insolvent period. Tr. Trans., Sept. 13, 2001 at 413-14. Joint Defendants, however, contend that insurance companies sitting above a layer containing insolvent coverage are entitled to the benefit of that insolvent coverage. Joint Defendants argue that all insurance in a layer beneath an insurance company – even insurance issued for a different

policy period – is "underlying insurance," not "other insurance."

B. Relevant Policy Language

The remaining policies in this action contain or incorporate an "other insurance" provision which is typically defined as follows:

> If other valid and collectible insurance with any other insurer is available to the Insured covering a loss also covered hereunder, this insurance shall be excess of, and shall not contribute with such other insurance. Excess insurance over the Limits of Liability expressed in this policy is permitted without prejudice to this insurance and the existence of such insurance shall not reduce any liability under this policy. Trial Exhs. 1-5, 9-37, 39-54, 56-62, 64-110.

The remaining insurance policies also define "underlying insurance" typically as follows: "UNDERLYING INSURANCE meaning all policies scheduled in Item [] of the Declarations." Trial Exh. 1-5, 9-37, 39-54, 56-62, 64-110.

C. Ruling on Effect of Insolvencies

The distinction between "other insurance" and "underlying insurance" is useful in determining the effect of insolvent policies. "Other insurance" provisions define "other insurance" as other "valid and collectible insurance" that is available on the *same layer* of coverage as the subject policy. *See, e.g.*, Cal.Prac. Guide, ¶¶ 8:11-12, 8:24.5; *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.*, 78 Cal.App.4th, 847, 899 (2000); *Span Inc.*

v. Associated Int'l Ins. Co., 227 Cal.App.3d 463, 480 (1991) (quoting *U.S. Fire Ins. v. Capital Ford Tr. Sales*, 355 S.E.2d 428, 433 (1987) "it [the policy] repeatedly states that other insurance must be collectible, but does not so state with respect to the underlying insurance . . . "); *McConnell v. Underwriters at Lloyd's of London*, 56 Cal.2d 637 (1961) (distinction between "other insurance" and "underlying insurance"). Louisiana law, likewise defines "other insurance" as collectible. *Kelly v. Weil*, 563 So.2d 221 (La. 1990). Insolvent coverage cannot be collectible insurance. *Hellman v. Great Am. Ins. Co.*, 66 Cal.App.3d 298 (1977); Cal.Prac. Guide, ¶ 8:24.5. Consequently, insolvent insurance cannot be calculated into any given layer to determine the amount of coverage available before any excess insurance policy is triggered.

For purposes of determining stated attachment points, the relevant inquiry is the policy language specifying "underlying insurance," which identifies the amount of insurance that sits directly beneath an excess insurance policy in any given policy year. In contrast to "other insurance," "underlying insurance," which is also defined within all applicable policies, sets the minimum attachment point that must be reached before that specific policy must respond. "Underlying insurance" refers only to the insurance identified in a specific policy as being specifically under that excess policy. *See, e.g.*, Cal.Prac. Guide, ¶¶ 8:11-12, 8:24.5; *Shade*, 78 Cal.App.4th at p. 899. Accordingly, by definition, "underlying insurance" cannot include insurance policies issued in other policy periods. Joint Defendants' attempt to expand the definition of "underlying insurance" to embrace all policies at lower levels or layers of coverage in *all* years does not comport with the language of the

policies and is inconsistent with the case law. Which consistently distinguishes "underlying insurance" from "other insurance." *Aerojet-General Corp. v. Transport Indemnity Co.*, 17 Cal.4th 38, 75 (1997).

Accordingly, the Court rules as follows:

1. Insolvent insurance policies are not "other insurance" for purposes of apportioning loss over multiple policy periods.

2. Where solvent policies and insolvent policies are triggered at the same layer of coverage, Fuller-Austin will not be required to contribute to an asbestos loss as a result of the insolvent policy periods.

3. An excess insurance company cannot apportion any loss to an insolvent period at a lower level of coverage. Rather, an excess insurance policy responds once the loss exceeds the available solvent coverage at lower layers.

IV. ISSUE NO. 6 – LEGAL EFFECT OF "DROP DOWN" PROVISIONS

A. Overview of Dispute

The parties dispute the application and relevance of the concept of "drop down." Fuller-Austin submits that it is not seeking to have any of the insurance companies "drop down" below their stated attachment points and fill a gap caused by the insolvency of an underlying insurance company. Where as Joint Defendants' position is that Fuller-Austin is seeking to have its insurance companies "drop down" and fill gaps caused by insolvent coverage. Further, Defendant Highlands contends that "cease to apply" language in certain of Highlands' policies requires that its excess policies provide no coverage where an

underlying insurance company becomes insolvent; and defendant Transcontinental contends that, to the extent that Highlands policies provide no coverage as a result of "cease to apply" language, the Transcontinental policies also "cease to apply."

B. Overview of "Drop Down" Concept

A Louisiana court defined "drop down" as

> the minimum threshold of the excess insurance company's obligation is lowered in order to cover the gap in coverage resultant from the primary insurance company's insolvency. Drop down coverage 'occurs when an insurance carrier of a higher level of coverage is obligated to provide the coverage that the carrier of the immediately underlying level of coverage has agreed to provide.

Louisiana Insurance Guaranty Assoc. v. Interstate Fire & Cas. Co., 630 So.2d 759, 761 fn. 1 (1994) (citations omitted). The minimum threshold referred to above is the attachment point set forth in the policies limits of liability and underlying insurance provisions. For example, a policy that provides $5,000,000 excess of $1,000,000 has a stated attachment point of $1,000,000. Drop down would occur when that excess insurance company is asked to pay a loss that is less than the $1,000,000 stated attachment point.

C. Court's Ruling on Drop Down

The Court finds no argument by Fuller-Austin that it was seeking to have any insurance company drop down and respond below their stated attachment point. Consequently,

the Court finds that, in accordance with its rulings on horizontal exhaustion/allocation and the impact of insolvencies, no excess insurance company is being required to "drop down," below its stated attachment point.

As to the "cease to apply" argument addressed by certain Defendants, the Court rules that the insolvency of an underlying insurance company does not relieve the excess insurance company of its obligations. The "cease to apply" provision is a following form clause designed to incorporate changes in insurance coverage from the underlying insurance policy into the excess insurance policy.[11] Here, the insolvency of an insurance company does not change the terms of the insolvent insurance policy, nor does it constitute a cancellation or termination of insurance coverage. It is not a situation where the following form provision has any application whatsoever.[12] At a minimum, the "cease to apply" language is ambiguous in the context of continuous injury claims and therefore must be construed in favor of coverage. *Safeco*, 26 Cal.4th at 763.

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[11] On this issue, the only cases provided to the Court by the parties, although not California authorities, support the court's findings. *Metropolitan Leasing Inc. v. Pacific Employers Ins. Co.*, 36 Mass.App.Ct. 536, 633 N.E.2d 434, 438 and fn. 4 (Mass. 1994); *Highlands Ins. Co. v. Gerber Products Co.*, 702 F.Supp. 109 (D.Md. 1988).

[12] For example, the *Highlands* case held that the excess insurance company still had an obligation to pay that portion of the liability in excess of the insolvent policy, but found that the liability did not exceed the stated limits of the insolvent policy.

Accordingly, the Court rules, as follows:

1. No excess insurance company is being required to respond to an asbestos loss below its stated attachment points.

2. No defendant is entitled to a credit for any insolvent coverage on a layer beneath or at the same level as its policy. Applying the ruling on the insolvency issue set forth above, the Court finds that the covered loss should be allocated to solvent unexhausted and unsettled policies on a layer by layer basis with no credit being afforded to any insurance company as a result of the insolvent coverage.

3. The "cease to apply" language does not impair, impact, or otherwise affect an insurance policy that sits above an insolvent insurance policy.

V. ISSUE # 2 – PAID OR HELD LIABLE TO PAY

A. Overview of Dispute

The parties dispute the interpretation and effect of the "paid or held liable to pay" language contained or incorporated into the Joint Defendants' insurance policies. Fuller-Austin's position is that the "paid or held liable to pay" language establishes that the policies are "liability" insurance policies, which obligate the Joint Defendants to pay once Fuller-Austin has been held liable in an amount that exceeds the stated attachment points of any given policy, irrespective of whether an underlying insurance company has paid its limit or anything at all.

In contrast, Joint Defendants' primary position is that no response is required until the underlying insurance companies have actually paid their full limits in indemnity

for covered asbestos liabilities directly to claimants. Joint Defendants further contend that payment of anything less than full policy limits does not constitute exhaustion.[13]

B. Overview of "Paid or Held Liable to Pay" Language

The "paid or held liable to pay" language typically is found in the limits of liability section of the insuring agreements.[14] There are other provisions typically found in the excess insurance policies that pertain to triggering of the insurance companies obligation to pay. In particular, the "ultimate net loss" clauses in the policies in this action are typically defined to "mean the total sum which the Assured, or any Company as his insurer, or both become obligated to pay by reason of personal injury, property damage or advertising liability claims." The "loss payable" provision provides a mechanism for making a claim against the insurance company either after the policyholder has paid or after the policyholder's liability has been fixed by judgment or settlement. Finally, the "maintenance of underlying insurance provision" makes clear that if an underlying insurance policy is not maintained in

[13] Joint Defendants now concede that the "paid or held liable to pay" language may be interpreted to trigger the Joint Defendants' insuring obligations where the liability exceeds the stated attachment points of the remaining umbrella and excess insurance policies. *See* Joint Insurers' Phase IB Trial brief, at p. 14. However, Joint Defendants have set forth certain criteria as to what constitutes a liability and assert that there currently is no liability that triggers their insuring obligations.

[14] In its Phase IA rulings, the Court found that the insurance policies in this action either contain or incorporate the "paid or held liable to pay" language or equivalent language.

full, the umbrella or excess insurance company is still liable in the same manner had the underlying insurance policy been maintained.

C. Court's Ruling on "Paid or Held Liable to Pay"

The excess insurance companies' policies provide coverage to the policyholder for losses (or "ultimate net loss") and define "loss" as sums paid or "payable." By using the word "payable" and not just "paid," the excess insurance policies clearly contemplate coverage for liabilities and amounts not yet paid. The insurance policies indicate that the excess insurance companies' obligation to pay arises upon the policyholder's liability – not upon the policyholder's payment of the liabilities. In other words, the remaining policies in this action are liability insurance policies, not indemnity policies.[15]

As such, the insurance companies' obligations to pay are triggered by Fuller-Austin's legal obligation to pay losses that exceed the excess insurance companies' stated attachment points, subject to "other insurance" principles discussed above. This holding is consistent with the language found in other clauses in the policy, including the "ultimate net loss" provision, which predicates the insurance companies' liability on the policyholder's "obligation" to pay, and not actual payment. Likewise, the "maintenance of underlying insurance" reinforces the proposition that even if the underlying insurance company

[15] As a result of Fuller-Austin's bankruptcy all of its remaining insurance policies are deemed liability insurance policies. *Haisten v. Grass Valley Reimbursement Fund. Ltd.*, 784 F.2d 1392, 1403 (9th Cir. 1986)

does not pay, whether it is because it is insolvent or otherwise, the excess insurance company's obligation will still arise.

California case law supports the Court's conclusion that "paid or held liable to pay" means that an insurance company is liable for, and its obligation to pay is triggered by, that portion of a liability that exceeds its attachment point, irrespective of whether the policyholder or the underlying insurance company has paid the underlying limits or anything at all. *See Span*, 227 Cal.App.3d at 480; *Denny's, Inc. v. Chicago Ins. Co.*, 234 Cal.App.3d 1786 (1991); *The Vons Companies, Inc. v. United Stats Fire Insurance Company*, 78 Cal.App.4th 52 (2000). Louisiana law is in accord. *Gasquet v. Commercial Union Ins. Co.*, 391 So.2d 466 (La.1980) (settlement with underlying insurance company for less than policy limits does not relieve excess insurance company from obligations); *Futch v. Fidelity & Casualty Company*, 246 La. 688 (1964); *Benroth v. Continental Casualty Co.*, 132 F.Supp. 270 (W.D.La.1955). Other jurisdictions, likewise, have held that an excess insurance company's obligations are triggered by the value of the liability and not by payment. *Zeig v. Massachusetts Bonding & Ins. Co.*, 23 F.2d 665 (2d Cir.1928 (Augustus Hand, J.)) (No need for payment of cash in full to trigger excess policy. Excess insurance company merely entitled credit if underlying insurance settled for less than policy limits.); *Rummel v. Lexington Insurance Co.*, 123 N.M. 752, 948 P.2d 970 (N.M.1997); *Insurance Co. of North American v. Kayser-Roth*, 770 A.2d 403 (R.I.2001).

In turn, a liability may be established by an adjudication, a judgment, or by a reasonable settlement. In the context of these liability policies, Fuller-Austin's legal

obligation was established at the time that the bankruptcy court entered judgment against Fuller-Austin, thus fixing Fuller-Austin's liability for all present and future asbestos claims. 1 Windt, Insurance Claims & Disputes § 6.05 p. 384 (3d ed. 1995) ("If the policy provides liability insurance, the insurer becomes liable immediately on the entry of judgment against the insured."). The aggregate value of that liability will be determined in the next phase, Phase II, by a jury pursuant to judicially recognized methodologies. *E.g.*, *In re Eagle-Picher*, 189 B.R. 681 (1995).

Joint Defendants concede that actual payment is not necessary, instead acknowledging that a liability in excess of their attachment points can trigger their obligations. *See* Joint Insurers' Phase IB Trial Brief, at p. 14 ("An excess policy may be implicated if an insured's present covered liability exceeds all underlying insurance."). Yet, a requirement that a policyholder would have to show "exhaustion by payment" would render this concession meaningless unless "exhaustion" can be shown by demonstrating a liability in excess of the attachment point. Exhaustion is not a defined term, either in the policies or the case law. Exhaustion has been used by courts in different factual scenarios to describe different events. The case law makes clear that the term "exhaustion" is different depending on the factual scenario presented.

For example, in the context of transferring the duty to defend, the case law describes exhaustion as requiring payment by the underlying insurance company of judgments or settlements. *See, e.g., Community Redevelopment of the City of Los Angeles v. Aetna Casualty & Surety Co.*, 50 Cal.App.4th 329 (1996). However, in the context of a legal obligation to pay, the case law describes exhaustion by reference to allocation of the loss to a given layer of

coverage (depending on the method of allocation adopted by the court) and whether that layer has sufficient limits to cover the loss. *See, e.g., Olympic Ins. Co. v. Employers Surplus Lines Ins. Co.*, 126 Cal.App.3d 593 (1981). Where the lowest level of coverage provides sufficient limits of available insurance to cover a loss in its entirety, that coverage is not exhausted for purposes of triggering a higher level excess insurance policy. However, where available insurance in a lower layer of coverage is not sufficient to cover the loss in its entirety, an excess insurance company is responsible for that portion of the loss that exceeds its stated attachment point – regardless of whether the underlying insurance company has paid or can pay an underlying judgment or settlement. *See, e.g., Span*, 227 Cal.App.3d 463; *Denny's*, 234 Cal.App.3d 1786; *Vons*, 78 Cal.App.4th 52. In other words, underlying coverage is exhausted when a loss exceeds the available underlying insurance.

Joint Defendants' reliance on duty to defend cases is readily distinguishable from the question posed here. *See*, Joint Insurers' Phase IB Trial Brief, at p. 12. The duty to defend is a separate and independent obligation that requires a primary insurance company to pay defense costs that have no impact on the policy limits available to pay the policyholder's actual liability. The exhaustion discussed in cases focusing on the transfer of the duty to defend is separate and distinct from the triggering event necessary to trigger an insurance company's obligation to pay.[16] In those cases [*Olympic*, 126 Cal.App.3d 593;

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[16] Likewise, the cases discussing the need for exhaustion before the excess insurance company will have an obligation to pay a policyholder's legal obligation [*e.g., Olympic*, 126 Cal.App.3d 593, 178

(Continued on following page)

Stonewall, 46 Cal.App.4th 1810] relied upon by Joint Defendants where the excess insurance company was found to have no obligation to pay, the liability did not exceed the amount of solvent insurance coverage underlying the excess insurance policy, a factual situation that is not presented here.[17] Louisiana law is in accord. *Kelly*, 563 So.2d at 226 ("There can be no liability imposed on U.S. Fire except for damages which might be awarded plaintiff in excess of the $1,000,000 underlying limits.") Accordingly, the focus is not on proof of exhaustion by payment, but on proof of the amount of the covered liability.[18] *Span*, 227 Cal.App. 3d at 468 (concluding that excess insurance company had no duty to "drop down" and "provide first dollar coverage upon the insolvency of Union," but that

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Cal.Rptr. 908; *Stonewall Ins. Co. v. City of Palos Verdes Estates*, 46 Cal.App.4th 1810, 54 Cal.Rptr.2d 176 (1996)] involved factual situations where the total amount of the fixed liability was less than the amount of insurance provided by all of the solvent primary insurance. These cases focused on allocation, and not exhaustion by payment. Under the facts in those cases, there was no need to allocate any of the loss to the excess insurance companies. Here, Fuller-Austin contends that the dollar amount of its legal obligation prior to bankruptcy and as a result of the bankruptcy judgment is in excess of the primary coverage.

[17] The aggregate amount of Fuller-Austin's covered legal obligation is a question of fact reserved for the jury phase of this action, to be determined in accord with the legal principles set forth herein.

[18] It should be noted that irrespective of the relevancy of actual exhaustion, Fuller-Austin contends that all of the primary insurance has been exhausted both by payment of judgments or settlements. In addition to producing documents from the primary insurance companies demonstrating payments, Fuller-Austin has also submitted depositions and declarations from all three primary insurance companies stating that their primary policies were exhausted by payment. Trial Exhs. 879, 880, 881. Assuming that exhaustion was a relevant inquiry, the Court finds that Fuller-Austin has met its burden in demonstrating such exhaustion.

excess insurance company remained liable "for that portion of the underlying judgment in excess of the Union policy limits"); *Denny's*, 234 Cal.App.3d at 1794 (if "the insured's liability exceed[s] the underlying insurance limits . . . liability attaches to the excess insurer, whether or not the underlying insurer has actually paid out the policy limit"); *Vons* 78 Cal.App.4th at 64 (coverage is triggered under an excess policy for losses the policyholder is legally obligated to pay in excess of underlying coverage).

The Court's holding is bolstered by the California cases that have found that an umbrella or excess insurance company has an obligation to participate in settlements when the potential settlement may invade that insurance company's limits of liability, even though the insurance underlying the excess insurance policy is not yet exhausted. *See, Kelley v. British Coml. Ins. Co.*, 221 Cal.App.2d 554 (1963); 1 Windt, Insurance Claims & Disputes § 5.26 p. 350 (3d ed. 1995) ("The fact that the excess insurer should have no duty to defend, since the primary insurer should still be providing a defense, is irrelevant. The duty [of an excess insurance company] to settle exists independently of the duty to defend."); *Diamond Heights Homeowners v. Nat'l American Ins. Co.*, 227 Cal.App.3d 563, 581-82, 277 Cal.Rptr. 906 (1st Dist. 1991); *Transit Cas. Co. v. Spink Corp.*, 94 Cal.App.3d 124, 135, 156 Cal.Rptr. 360 (1979).

Having found that it is the liability of the policyholder, and not the conduct of the underlying insurance company, that triggers the umbrella or excess insurance companies' obligations, the Court concludes as follows:

1. Actual payment in cash by underlying insurance companies is not a condition precedent to an umbrella or excess insurance company's obligation. An umbrella or excess insurance company has obligations that pre-exist and are independent of actual exhaustion by payment of the underlying limits. These obligations include, the duty to participate in settlement negotiations [*Kelley*, 221 Cal.App.2d 554], the duty to accept a reasonable settlement [*Diamond Heights*, 227 Cal. App. 3d 563; *Armstrong*, 45 Cal. App. 4th at 85; *Comunale v. Traders & General Ins. Co.* 50 Cal.2d 654, 658 (1958)], the duty of good faith and fair dealing [*Schwartz v. State Farm Fire and Cas. Co.*, 88 Cal. App. 4th 1329 (2001)], the duty to inquire when the underlying insurance company is insolvent [*Span*, 227 Cal.App.3d 463], and the duty to pay that portion of the liability that exceeds the underlying coverage [*Span*, 227 Cal. App. 3d 463; *Denny's*, 234 Cal.App.3d 1786; *Vons*, 78 Cal.App.4th 52].

2. Exhaustion by payment is not a prerequisite to triggering an umbrella or excess insurance company's obligation, as opposed to the transfer of the duty to defend. Such an obligation is triggered by a liability that exceeds underlying coverage. *Span*, 227 Cal.App.3d 463; *Denny's*, 234 Cal.App.3d 1786; *Vons*, 78 Cal.App.4th 52; Joint Insurers' Phase IB Trial Brief, at p. 14.

3. Accordingly, the fact that an underlying insurance company may have paid its limits to Fuller-Austin or the Fuller-Austin Asbestos Settlement Trust ("Trust"), and this money has not yet been distributed to claimants, is irrelevant to the inquiry of whether the umbrella or excess insurance company's obligations have been triggered. Additionally, and as discussed more fully below, the payment by the underlying insurance company accompanied

by a dismissal from the action constitutes exhaustion of the dismissed party's limits, thus rendering this inquiry moot. *Phoenix Ins. Co v. U.S. Fire Ins. Co.*, 189 Cal.App.3d 1511 (1987).

4. Likewise, installment payments by settling insurance companies constitute exhaustion of coverage where such payments are made for liabilities that exceed the settling insurance company's policy limits. The timing of these payments negotiated through settlement does not inure to the benefit of the non-settling and remaining Joint Defendants. The fact that an underlying insurance company may have been able to secure a beneficial payment schedule has no effect on the relevant inquiry – whether the liability in question triggers the excess insurance coverage.

5. Where the policyholder and the insurance company contest exhaustion, the burden is on the insurance company to prove exhaustion. *Hartford Acc. & Indem. Co. v. Sup. Ct.*, (*Syntex*), 23 Cal.App.4th 1774 (1994). However, if the dispute is resolved, and the insurance company is dismissed without a cross-claim asserted by a non-settling insurance company, the inquiry is complete and the settled insurance company's insurance limits are deemed exhausted. Here, there is no dispute between the settled insurance companies and Fuller-Austin as to whether the settled insurance policies are exhausted.

VI. ISSUE NO. 5 – EXHAUSTION AS A MATTER OF LAW

A. Overview of Dispute

Fuller-Austin contends that when an insurance company settles and is dismissed from a coverage action,

and the remaining insurance companies do not cross-claim against the settling insurance company, then the settling insurance company's policies are deemed exhausted. *Phoenix*, 189 Cal. App. 3d 1511. Joint Defendants insist that the only method of exhausting a policy is by *actual payment* of policy limits on account of judgments or settlements in the underlying cases. Consequently, Joint Defendants assert they have no obligations whatsoever under their policies until Fuller-Austin proves such exhaustion. Further, Joint Defendants argue they, could not have cross-claimed against the settling defendants as a result of the channeling injunction which, Joint Defendants assert, bars such actions.

B. Status of Settled Policies

It is undisputed that the following insurance companies have settled and been dismissed from this action:

1. April 2, 1997 – Commercial Union dismissed from the action.
2. July 2, 1998 – AIG dismissed from the action
3. July 28, 1998 – Fuller-Austin filed fifth amended complaint removing Security – a *de facto* dismissal.
4. February 10, 1999 – Appalachian dismissed from the action.
5. March 22, 1999 – Wausau dismissed from the action.
6. May 6, 1999 – Security dismissed from the action.

7. November 22, 2000 – Allstate dismissed from the action.

Additionally, London Market has settled certain of its policies. The settlements have been marked as exhibits in this Phase. See, Trial Exhs. 873-878. No objections were filed to the settlements or dismissals, and no cross-claims were brought against the settling defendants.

C. Court's Ruling on Exhaustion as a Matter of Law

Phoenix stands for the proposition that when the policyholder settles and dismisses an insurance company from a coverage action without the non-settling insurance companies filing cross-claims for contribution, subrogation, or other equitable relief against the settling insurance company, the settling insurance company's policies will be deemed exhausted. Joint Defendants' reliance on case law that holds that there must be exhaustion for purposes of transferring the duty to defend are not relevant to this inquiry. As noted in the discussion herein, there are obligations recognized by the courts and spelled out in the policies that exist independent of the duty to defend and irrespective of actual exhaustion by payment.

The rationale behind the *Phoenix* ruling is entirely applicable here. The remaining Joint Defendants are disputing whether the primary insurance coverage has been exhausted. That dispute, however, should be between the excess insurer and the settling primary insurer. It is not appropriate to place Fuller-Austin, a policyholder that does not have documentation regarding an insurance company payments for purpose of exhaustion, in the position of having to prove exhaustion of insurance provided by

parties that are no longer in the case. If the Joint Defendants wanted to challenge exhaustion of coverage provided by settling insurance companies, they had the right to (i) object to the settlements and dismissals at the time they were filed with the Court, and (ii) assert cross-claims against their co-defendants on the "exhaustion" dispute. Having declined to pursue these remedies, the remaining Joint Defendants cannot challenge the exhaustion of the settled policies. that is precisely the circumstances that the *Phoenix* decision was intended to address.

Finally, the Court is not persuaded by Joint Defendants' argument that they were barred from seeking equitable contribution or subrogation from the settling insurance companies based on the channeling injunction issued by the bankruptcy court. There are several flaws with this argument, including the fact that several of these settlements and dismissals occurred prior to the bankruptcy and, yet, Joint Defendants did not object to the settlements and dismissals or cross-claim against the settling defendants [Commercial Union and AIG]. Likewise, Joint Defendants made no attempt to appeal the bankruptcy court's ruling with respect to granting a channeling injunction to those insurance companies that settled.

Accordingly, the Court rules, as follows:

1. The policies issued by the settled and dismissed insurance companies are deemed exhausted as a matter of law.

VII. EXCESS POLICY TRIGGERS

A. Overview of Dispute

Fuller-Austin contends that there are several events that trigger the umbrella and excess insurance companies' obligations.

Prior to its bankruptcy, Fuller-Austin had judgments and settlements that were in excess of any remaining primary coverage, thus triggering the umbrella and excess insurance companies' obligations. Fuller-Austin contends that the confirmation of the bankruptcy plan is a judgment and an adjudication, as those terms are used in the policies, and that the bankruptcy establishes Fuller-Austin's liability and damages for the underlying asbestos claims. Consequently, Fuller-Austin argues that under the policy language and case law, the judgment and adjudication obligates the excess insurance companies to pay the full aggregate value of Fuller-Austin's legal obligation for pending and future asbestos claims, and that a jury should be allowed to determine the aggregate amount of damages based on expert testimony and other evidence.

Additionally, Fuller-Austin maintains that the "allowed amount", as defined in the bankruptcy is, at a minimum, the allowed liquidated value attributable to a given claim. Further, Fuller-Austin insists that the "allowed amount" for all of the asbestos victims whose rights were necessarily adjudicated by the confirmation of the plan is Fuller-Austin's liability.

Finally, relying on *Armstrong*, Fuller-Austin contends that it is entitled to a presumption that the asbestos claims adjudicated by the bankruptcy judgment are harm within the coverage of each and every one of its insurance policies.

The Joint Defendants argue that no obligations arise until, and unless, Fuller-Austin proves to their satisfaction that all policies attaching at a lower level, including insolvent insurance policies, are exhausted by payment of judgments or settlements. Alternatively, Joint Defendants maintain that, although they may have obligations to pay judgments or settlements that are in excess of the underlying coverage, the confirmation of the plan or reorganization is not a judgment and, as a settlement, it is not binding on the insurance companies because the companies did not consent.

Assuming arguendo that the judgment is binding, the Joint Defendants suggest that the umbrella and excess insurance companies are not obligated to pay the allowed liquidated value, but only the amount that Fuller-Austin is able to pay. Joint Defendants contend that the amount Fuller-Austin actually pays to a claimant is the "allowed amount" under the plan documents, and, therefore, Fuller-Austin's liability. Moreover, Joint Defendants insist that they only are obligated to pay this amount if, and when, a claim is allowed and that Fuller-Austin has the burden of demonstrating that each asbestos claim is for harm within coverage.

Overview of Trigger of Umbrella and Excess Insurance Companies' Obligations

The Legal questions posed are what are an umbrella or excess insurance company's obligations and when do they arise? The answers to these questions will impact (i) whether the umbrella and excess insurance companies had obligations to Fuller-Austin prior to Fuller-Austin's bankruptcy, and (ii) whether these umbrella and excess

insurance companies have obligations as a result of Fuller-Austin's bankruptcy.

California courts have imposed independent duties on an umbrella or excess insurance company to settle or to participate in settlements prior to the exhaustion of underlying insurance coverage. An umbrella or excess insurance company, given notice of a proposed settlement, is faced with choices: The umbrella or excess insurance company can acknowledge coverage and assume the defense or take over settlement negotiation; the umbrella or excess insurance company can deny coverage; the umbrella or excess insurance company can do nothing, neither acknowledging coverage or denying coverage. As discussed below, each of these actions by the umbrella or excess insurance company has consequences.

C. Court's Ruling on Excess Policy Triggers

Legal Principles. California law recognizes that an excess insurance company has obligations that arise prior to, and irrespective of exhaustion (either by payment or through allocation), as follows:

1. An excess insurance company has an obligation to ensure that the insured receives the benefits of its policy. This obligation arises at the inception of the policy, not upon the exhaustion of the underlying policy. Accordingly, exhaustion of underlying insurance is not a condition precedent to triggering an excess insurance company's obligations. *Schwartz*, 88 Cal. App. 4th 1329.

2. An excess insurance company has a duty to accept reasonable settlements on its policyholder's behalf. This duty is separate and independent from any duty to defend

and arises prior to exhaustion by payment of claims. *Kelley*, 221 Cal. App. 2d at 563; Windt, Insurance Claims & Disputes § 5.26 p. 350 (3d ed. 1995) ("The fact that the excess insurer should have no duty to defend, since the primary insurer should still be providing a defense, is irrelevant. The duty [of an excess insurance company] to settle exists independently of the duty to defend."); Cal. Prac. Guide, at ¶ 12.93 ("[w]here the insured has both primary and excess liability coverage, each insurer owes a duty to accept reasonable settlement demands within its policy limits").

3. Even if an excess insurance company has not denied coverage or refused to defend, the insurance company has a duty to accept a reasonable settlement, and its refusal to settle may give rise to the insured's action for reimbursement of the settlement and a presumption that the claims settled are harm within the coverage. *Armstrong*, 45 Cal.App.4th at 85, 52 Cal.Rptr.2d 690. As found in *Armstrong*:

> The Isaacson court went on to say that even if the insurer has not denied coverage or refused to defend, the insurer has a duty to accept a reasonable settlement, and the insurer's refusal to settle may give rise to the insured's action for reimbursement of the settlement. (44 Cal.3d at p. 792; see also Crisci v. Security Ins. Co. (1967) 66 Cal.2d 425, 430 [58 Cal.Rptr. 13, 426 P.2d 173]; Comunale v. Traders & General Ins. Co. (1958) 50 Cal.2d 654, 659 [328 P.2d 198].) (26b) In such a case, the insured has the burden of showing the settlement was reasonable and if it meets that burden, then again the act of settlement raises two presumptions: that the claim was legitimate and that the amount of the settlement was the

amount of the insured's liability. (Isaacson v. California Ins. Guarantee Assn., supra, 44 Cal.3d at pp. 793-794.)

4. An excess insurance company's obligation to participate in settlement negotiations arises when a liability potentially exceeds the underlying insurance coverage – even though the underlying coverage is not exhausted by payment of claims. *Diamond Heights*, 227 Cal.App.3d 563; *Transit Cas.*, 94 Cal.App.3d at 135.

5. Three options are available to an umbrella or excess insurance company when asked to contribute to settlement that invades its policy limits: (i) assume the defense and take the case to trial, (ii) accept the settlement and seek reimbursement from a primary insurance company, or (iii) challenge the settlement as unreasonable and collusive. *Diamond Heights*, 227 Cal.App.3d at 578-580; California Insurance Law Handbook (West Group 2001), § 32.03 at p. 658; California Liability Insurance Practice, Claims and Litigation. Vol. 2, (CEB 2000), § 17.43.

6. An excess insurance company has a heightened duty of inquiry regarding pending claims when the underlying insurance company is insolvent. *Span*, 227 Cal.App.3d 463.

7. An excess insurance company's right to participate in settlement negotiations and to consent to settlements only arises where it has acknowledged coverage. If an excess insurance company reserves its right to contest coverage, the policyholder is excused from any provision requiring insurance company consent. 14 Couch on Insurance (3d ed. 1999) § 199:48, p. 199-92. By reserving its right to deny coverage, the insurance company surrenders

the right to control the conditions of payment. *United Services Auto. Ass'n v. Morris*, 741 P.2d 246 (Ariz. 1987); *Insurance Co. of North America v. Spangler*, 881 F.Supp. 539, 544 (D. Wyo. 1995) (no breach of policy provision where insured settles without insurance company's consent where insurance company defending under reservation of rights); *Taylor v. Safeco Ins. Co.*, 361 So.2d 743 (Fla.Dist.Ct.App.1978) (same).

8. An excess insurance company's obligations are triggered by a liability that exceeds the underlying insurance and invades the excess insurance company's limits. *Span*, 227 Cal.App.3d at 468; *Deny's*, 234 Cal.App.3d at 1794; *Vons*, 78 Cal.App.4th at 64; *Benroth*, 132 F.Supp.270 (1955) (applying Louisiana law); *Zeig*, 23 F.2d 665; *Rummel*, 123 N.M. 752.

9. An excess insurance company's obligation to pay that portion of a liability that exceeds the underlying insurance is independent of and not affected by whether the underlying insurance company has paid its limits or paid anything at all. *Span*, 227 Cal.App.3d at 468; *Denny's*, 234 Cal. App. 3d at 1794; *Vons*, 78 Cal. App. 4th at 64; *Gasquet*, 391 So.2d 466; *Futch*, 166 So.2d 274; *Benroth*, 132 F.Supp. 270 (1955) (applying Louisiana law); *Zeig*, 23 F.2d 665 (2d Cir. 1928) (Augustus Hand, J.)); *Rummel*, 123 N.M. 752, (N.M.1997).

10. An insurance company's obligation to its policyholder does not end upon the filing of a lawsuit by the policyholder against the insurance company for the purpose of determining the insurance company's obligations. *White v. Western Title Ins. Co.*, 40 Cal.3d 870, 221 (1985).

11. An insurance company's obligation to its policyholder does not end if the policyholder is bankrupt or

insolvent. Cal. Ins.Code § 11580. In fact, a policyholder's bankruptcy transforms indemnity policies into liability policies [*Haisten*, 784 F.2d at 1403] and excuses a policyholder from conditions it cannot meet as a result of the bankruptcy [*In the Matter of Federal Press*, 104 B.R. 56, 62 (N.D.Ind. 1989)]; *Home Insurance Company of Illinois v. Hooper*, 294 Ill. App. 3d 626, 632-634, 691 N.E.2d 65 (1998).

It is not disputed that as of February 1993, Fuller-Austin gave notice to the umbrella and excess insurers that Fuller-Austin may encounter asbestos liabilities that would impact its umbrella and excess coverage. Subsequently, Fuller-Austin gave the low-level umbrella insurance companies notice of potential settlements that, given the remaining limits on the primary coverage, Fuller-Austin believed impacted these umbrella policies. The umbrella insurance companies did not pay any of these settlements prior to the bankruptcy. Further, it is also undisputed that (i) Fuller-Austin provided notice to the Joint Defendants that it would entertain global settlement negotiations with representatives of both present and future asbestos claimants with a goal to accomplish a global settlement in conjunction with a filing for bankruptcy, and (ii) Fuller-Austin provided notice to defendants of the bankruptcy plan and hearings. Clearly, the excess insurance companies' obligations were triggered.

Bankruptcy As Judgment, Adjudication Or Settlement. The policies pay legal obligations after adjudication or compromise (*i.e.*, settlement). The confirmation of the plan of reorganization is, as a matter of law, a judgment. 11 U.S.C. §§ 1141, 1142; Bankruptcy Rule 9001; *see*, 5 *Moore's Federal Practice* 3d § 131.23[5][b]; ("Many rulings

and orders that occur under the umbrella of a bankruptcy proceeding are in the nature of final judgments. . . . Examples include confirming compositions, arrangements or reorganization plans."); *Sioll v. Gottlieb*, 305 U.S. 134, 59 S.Ct. 134, 83 L.Ed. 104 (1938); *In re French Gardens, Ltd.*, 58 B.R. 959 (S.D.Tex.1986); *In re Emmer Brothers Co.*, 52 B.R. 385 (D.Minn.1985); *In re Economy Lodging Systems, Inc.*, 1999 WL 184058 (1999). It also is an "adjudication" of Fuller-Austin's liability and damages. *Federated Management Company v. Latham & Watkins*, 138 Ohio App.3d 815, 742 N.E.2d 684 (2000) ("In the bankruptcy context, an order confirming a plan of reorganization constitutes a judgment and a final adjudication on the merits of a bankruptcy proceeding."); Webster's Ninth New Collegiate Dictionary, 1985, p. 56. ("adjudication" defined as "a decree in bankruptcy"); Random House Unabridged Dictionary, Second Edition, 1997, p. 25 ("adjudication" defined as "a court decree in bankruptcy").

As a judgment and an adjudication by a court, the liabilities established by the confirmed bankruptcy plan trigger coverage under the insurance policies. *Certain Underwriters at Lloyd's London v. Superior Court ("Powerine")*, 24 Cal.4th 945, 960 (2001). *Powerine*, which cited *AIU* approvingly, reaffirmed the proposition that the duty to indemnify "embraces all money ordered by a court, including money that the insured must give under law as compensation to third parties' and also 'money that the insured must itself expend *in equity* in order to provide relief of the same sort." *Powerine*, 24 Cal.4th at 966. Under California law, the judgment is presumed to encompass harm within the coverage. *Armstrong*, 45 Cal.App.4th at 62-3.

The Joint Defendants' arguments that the bankruptcy proceedings were not an "actual trial," as the term is used in the policies is unavailing. The requirement of an "actual trial" is found in the "no-action" clause. California courts hold that the "no-action" clause has no application in the context of a suit by a policyholder against its own insurance company. *Earth Elements, Inc. v. National Am. Ins. Co. of Cal.*, 41 Cal. App. 4th 110 (1995). Even assuming that an "actual trial" was a prerequisite to coverage, the Court finds that, as matter of law, the bankruptcy adjudication satisfies the two components of an "actual trial": "(1) an independent adjudication of facts based on an evidentiary showing; and (2) a process that does not create the potential for fraud and abuse." *Pruyn v. Agricultural Ins. Co.*, 36 Cal.App.4th 500, 517 (1995) (quoting *National Union Fire Ins. Co. v. Lynette C.*, 27 Cal.App.4th 1434, 1449 (1994)).

Here, the bankruptcy court was bound to exercise independent review and make specific findings before approving the proposed consensual plan of reorganization. 11 U.S.C. § 1129(a)(3); 11 U.S.C. § 524(g); *In re Texaco Inc.*, 84 B.R. 893, 901 (Bankr.S.D.N.Y. 1988) (citations omitted) ("The important determinations in reorganization proceeding must receive the 'informed independent judgment of the Bankruptcy court'.").

The bankruptcy court was required to assess independently whether the compromises contained in Fuller-Austin's reorganization plan were "within the reasonable range of litigation possibilities." *Texaco*, 84 B.R. at 902. Indeed, Fuller-Austin's plan only could be approved if it was proposed in good faith and was not collusive, a finding that the bankruptcy court specifically made. 11 U.S.C. § 1129(a)(3). The Court finds that the process employed by

the bankruptcy court meets the definition of "actual trial" set forth in *Pruyn* and *Lynette C.*

The fact that the excess insurance companies were found to have no standing in the bankruptcy matter does not make the judgment a nullity as to them. An insurance company is bound by the finding of liability and damages even where it is denied standing in the underlying action that established the policyholder's legal obligation. *Tomassi v. Scarff*, 85 Cal. App. 4th 1053, (2000):

> The judgment in the liability action collaterally estops the insurer only on issues necessarily adjudicated in the liability action, i.e., the insured's liability and the amount of the insured party's damages. It does not bind the insurer on coverage issues. *Tomassi*, 85 Cal.App.4th at 1057, 102 Cal.Rptr.2d 750.

Obligation To Pay Liability In Full. Finally, two questions have arisen as to (i) whether the Joint Defendants are responsible for Fuller-Austin's legal obligation, as opposed to the amount Fuller-Austin is able to pay, and (ii) whether the Joint Defendants only pay when Fuller-Austin allows a claim.

As to the first inquiry, the Court finds that the policies provide that the excess insurance companies pay Fuller-Austin's entire legal obligation up to their respective policy limits. Not only do the insuring agreements provide for such a result, but the fundamental purposes of the bankruptcy or insolvency provisions of their policies would be thwarted if insurance companies were allowed to escape responsibility based on an insolvent policyholder's inability to pay. Cal. Ins.Code § 11580; *Webster v. Superior Court*, 46 Cal.3d 338, 347-48 (1988); *Johnson v. Holmes*

Tuttle Lincoln-Mercury, 160 Cal. App. 2d 290 (1958). The authorities cited to the Court are consistent on this issue. *See, Insurance Co. of the State of Pennsylvania v. Associated International Ins. Co.*, 922 F.2d 516 (9th Cir. 1991); 1 Couch on Insurance (3d ed.1999) § 9:26, p. 199-92. The policies at issue in this action are liability policies that pay Fuller-Austin's legal obligation, and not merely what Fuller-Austin has been able to pay.

The plan documents also are clear that the "allowed amount" is Fuller-Austin's legal obligation. This amount is, at a minimum, the "allowed liquidated value." The Court is not persuaded by the Joint Defendants' argument that the "allowed amount" equals the "allowed liquidated value" divided by the "payment sum percentage." The plan documents simply do not lend themselves to that interpretation, and the testimony of witnesses involved in the drafting of these documents and in the administration of the Trust belies such an interpretation.

Likewise, in the reinsurance context, insurance companies receive reimbursement for liabilities, not just payments. *Associated International*, 922 F.2d 516; 1 Couch on Insurance (3d ed.1999) § 9:26, p. 199-92 ("the reinsured's claim against the reinsurer is not based upon its relative ability to pay, but upon its liability to pay.").

Aggregate Asbestos Liability. The Court further finds that Fuller-Austin will be entitled to present evidence to a jury regarding its aggregate asbestos liability – *i.e.*, the present liability of Fuller-Austin to pay pending and future asbestos claims. The right to establish and recover future damages in a contract or tort action is a fundamental tenet of California law. Cal.Civ.Code § 3283 ("INJURIES RESULTING OR PROBABLE AFTER SUIT BROUGHT.. Damages

may be awarded, in a judicial proceeding, for detriment resulting after the commencement thereof, or certain to result in the future."). The key to awarding such damages is whether there is a sufficient method for ascertaining these damages. Future damages may be awarded where there is a satisfactory method for obtaining a reasonably proximate estimation; there is no requirement for mathematical precision. *Noble v. Tweedy*, 90 Cal.App.2d 738, 203 P.2d 778 (1949); *Stott v. Johnston*, 30 Cal.2d 864, 229 P.2d 348, 355 (1951).

The ability to calculate present and future asbestos liabilities and the methodologies employed by Fuller-Austin's experts, Dr. Peterson and Dr. Florence, have been recognized in published opinions. *See, In re Johns-Manville Corp.*, 830 F.Supp. 686 (S.D.N.Y.1993); *Eagle Picher*, 189 B.R. 68. The acceptance of this scientific evidence is sufficient to meet the standard in California set forth in *People v. Kelly*, 17 Cal.3d 24, 32 (1976). In other words, a "case-by-case adjudication as to the 'general acceptance' prong of the Kelly test is not required once the scientific technique has been endorsed in a published appellate opinion." *People v. Barney*, 8 Cal.App.4th 798, 824-25 (1992); *People v. Morganti*, 43 Cal. App. 4th 643, 658, 666 (1996).

Fuller-Austin finds support for its position in the case law addressing reinsurance. For example, in *Associated International*, 922 F.2d 516, an insurance company sought coverage from its reinsurer for a settlement which bound the insurance company to pay both present and future asbestos claims. Under the same insuring agreement language presented here – "to indemnify [the policyholder] for all sums which [the insured] shall be obligated to pay by reason of the liability . . . "– the Court held that the

reinsurer was obligated to pay the future claims, as well as the present claims subsumed in the settlement.

Fuller-Austin finds further support in the Seventh Circuit's decision in *UNR Industries, Inc. v. Continental Ins. Co.*, 942 F.2d 1101 (7th Cir. 1991), cert. denied, 503 U.S. 971 (1992), which addressed the precise issues of insurance coverage for asbestos bodily injury claims in the context of a bankruptcy. The Court finds no meaningful differences between the law and facts presented in *UNR* and the Fuller-Austin circumstances.

The Seventh Circuit held that UNR's reorganization "was a judgment or settlement and so triggers CNA's insurance obligations." 942 F.2d at 1104-05. In particular, the order confirming UNR's reorganization, like the one confirming Fuller-Austin's reorganization, was final, binding, and established the policyholder's obligations sufficient to trigger coverage. 942 F.2d at 1104-05. The *UNR* court rejected CNA's position that the amount of UNR's loss depends on how much money the UNR Trust is actually able to pay. To do otherwise, would "threaten[] to confer a windfall on CNA at the asbestos victim's expense." 942 F.2d at 1105. Likewise, the Fuller-Austin Trust is required to pay the full amount of the claims to the extent that it has available assets. Fuller-Austin's insurance companies also are required to pay the full asbestos liabilities, and cannot obtain a "windfall" as a result of the bankruptcy. *See also, Webster*, 46 Cal.3d at 347-48, 250 Cal.Rptr. 268, 758 P.2d 596 (principal purpose of § 11580 is to preclude an insurer from "windfall" as a result of insured's bankruptcy).

The *UNR* court also held that the aggregate value of all of the asbestos claims (both present and future) had

been determined in the bankruptcy proceedings and that determination was binding on CNA. *Id.*, at 1105. Here, the parties agreed that the valuation of Fuller-Austin's asbestos claims would be preserved and made in this action. Once made, it should be binding on Joint Defendants.

The *UNR* court held that an excess insurance company, CNA, would be liable for the full value of pending and future asbestos claims based on a bankruptcy-established liability. The *UNR* court rejected CNA's position that the amount of UNR's loss depends on how much money the UNR Trust is actually able to pay. To do otherwise, would "threaten[] to confer a windfall on CNA at the asbestos victim's expense." 942 F.2d at 1105. Fuller-Austin's insurance companies also are required to pay the full asbestos liabilities, and cannot obtain a "windfall" as a result of the bankruptcy.

The Court finds that the approaches and principles set forth in the *UNR* decision are persuasive and helpful in resolving this dispute.

As to the question of "consent," the Court rules that the confirmation of the bankruptcy plan is an "adjudication" and, therefore, rendered the issue of consent moot. Nevertheless, even if the Court were to view the confirmation as a "compromise." Fuller-Austin did not breach the insurance policies as a result of filing for bankruptcy without the express approval of the insurance company Joint Defendants. Prior to the bankruptcy, all of the Joint Defendants had been provided notice of the bankruptcy negotiations, were offered an opportunity to participate in

the negotiations[19], were provided copies of the bankruptcy plan, and participated in the confirmation hearing by filing objections. These undisputed facts are sufficient to establish, under California law, that Fuller-Austin met its obligations under the insurance policies triggering Joint Defendants' right to consent to Fuller-Austin's global settlement, and Joint Defendants' obligations arising therefrom.

Notice And Consent. The parties have spent considerable effort providing the Court with California case law on "consent." The Court adopts the following principles and authorities.

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[19] On October 17, 1997, Fuller-Austin addressed correspondence to its insurance carriers advising of the proposed global settlement negotiations in the underlying asbestos claims. This correspondence contained the following two separate statements:

1. "Fuller's insurance companies have the option of directing Fuller not to engage in such negotiations or settlement, however Fuller will accept such a direction only if accompanied by written binding commitments wherein all insurers accept tender of asbestos claim defense and asbestos claim indemnity without a reservation of rights."

2. "We have no objection to your representative participating in this settlement process in an appropriate manner; however, the execution of an appropriate understanding will be required in order to protect the privileged nature of the discussions, and to avoid interference with the negotiation process."

Exhs. 7683, 7684. Two representatives, Charles Carluccio for the London Market Insurers and Charles Eisner for Appalachian Insurance Company, attended portions of the October 21, 1997 meeting and were excluded from portions of the meeting. *See Eisner Testimony, September 26, 2001, at pp. 1830 and 1839.*

Waiver of Notice and Control. As set forth in the California Practice Guide:

> "An insurer that has erroneously denied coverage cannot avoid liability for its failure to settle or defend by claiming lack of opportunity to do so. By denying coverage, the insurer waives its right to control defense of the third party action. The insured therefore is under no obligation to notify the insurer upon being served or to request a defense."

Cal. Prac. Guide, ¶ 12:606, citing *CNA Cas. of Calif. v. Seaboard Sur. Co.*, 176 Cal.App.3d 598, 618 (1986) ("the law is established that where an insurance company denies liability under a policy which it has issued, it waives any claim that the notice provisions of the policy have not been complied with."); *Perkins v. Allstate Ins. Co.*, 63 F.Supp.2d 1164, 1175-76 (C.D.Cal.1999) (applying California law). "Similarly, when coverage and a defense have been denied, the insured owes no duty to keep the insurer informed of subsequent developments in the third party lawsuit – *e.g.*, of the trial date, or of a settlement agreement between the insured and injured party." Cal. Prac. Guide, ¶ 12:609, citing *Samson v. Transamerica Ins. Co.*, 30 Cal.3d 220, 242 (1981). After coverage has been denied, the insured need not "go through the motions of requesting a defense." Cal. Prac. Guide, ¶ 12:613, citing *Samson*, 30 Cal.3d at 239. An "open-ended denial" in which the insurer expresses a willingness to reconsider upon additional information is tantamount to a denial. Cal. Prac. Guide, ¶ 12:615.5, citing *Perkins*, 63 F.Supp.2d at 1174; *National American Ins. Co. v. Certain Underwriters at Lloyd's London*, 93 F.3d 529, 540 (1996) ("where an insurer does not respond to notice from the insured that it intends to settle with an adversary, the insurer may not

then invoke a clause in the policy requiring the insured to obtain approval prior to settling any claims.").

Failure to Settle. An insurer acts at is own risk when it refuses to defend or settle a claim:

> "If coverage is ultimately established, the insurer is liable for all damages resulting from its refusal to settle: 'If an insurer honestly believes that its policy does not provide coverage and, therefore, chooses to reject a reasonable settlement offer, it must bear the responsibility if coverage is found."

Cal. Prac. Guide, ¶ 12:621 (emphasis in original), citing *Samson*, 30 Cal.3d at 237; *Johansen v. California State Auto. Ass'n, Inter-Ins. Bureau*, 15 Cal.3d 9, 12 (1975). An insurer's wrongful refusal to assume the defense of underlying litigation forfeits its right to control settlement and defense. Cal. Prac. Guide, ¶ 12:632, citing *Clark v. Belefonte Ins. Co.*, 113 Cal.App.3d 326, 335 (1980); *Isaacson v. California Ins. Guar. Ass'n*, 44 Cal.3d 775, 791 (1988); *Pruyn*, 36 Cal. App. 4th at 520-25. As further noted in the California Practice Guide:

> "Even though an insurance policy precludes insureds from settling claims without the consent of the insurer, the insured is permitted to make a good faith, reasonable settlement when the insurer wrongfully denies coverage and refuses to defend. In these situations, '*the insurer is deemed to have waived* its rights under the "no action" clause.'"

Cal. Prac. Guide, ¶ 12:633 (emphasis in original), citing *Diamond Heights*, 227 Cal. App. 3d at 581; *Lamb v. Belt Cas. Co.*, 3 Cal.App.2d 624, 631 (1935). Even if the insurer has not denied coverage or refused to defend, the insurer has a duty to accept a reasonable settlement, and the

insurer's refusal to settle may give rise to the insured's action for reimbursement of the settlement. As set forth in the *Armstrong* decision:

> "[E]ven if the insurer has not denied coverage or refused to defend, the insurer has a duty to accept a reasonable settlement, and the insurer's refusal to settle may give rise to the insured's action for reimbursement of the settlement. (44 Cal.3d at p. 792; see also Crisci v. Security Ins. Co. (1967) 66 Cal.2d 425, 430 [58 Cal.Rptr. 13, 426 P.2d 173]; Comunale v. Traders & General Ins. Co. (1958) 50 Cal.2d 654, 659 [328 P.2d 198].) In such a case, the insured has the burden of showing the settlement was reasonable and if it meets that burden, then again the act of settlement raises two presumptions: that the claim was legitimate and that the amount of the settlement was the amount of the insured's liability. (Isaacson v. California Ins. Guarantee Assn., supra. 44 Cal.3d at pp. 793-794.)"

Armstrong, 45 Cal.App.4th at 85.

Presumptions Arising from Coverage Denial. Where coverage has been denied, the insured is free to settle the underlying claim in good faith. The settlement, at a minimum, gives rise to presumptions in the insured's favor:

> "Where a refusal to defend is shown, the insured is given the benefit of an evidentiary presumption that any settlement negotiated with the injured party was reasonable: *i.e.*, that the third party's claim against him or her was legitimate, and that the insured was liable in the amount he or she agreed to pay in settlement. . . ."

Cal. Prac. Guide, ¶ 12:655, citing *Isaacson*, 44 Cal.3d at 791, 244 Cal.Rptr. 655, 750 P.2d 297. The presumption, under these circumstances, is rebuttable. Cal. Prac. Guide, ¶ 12:656. However, where there is "adequate judicial participation" in approving or confirming the settlement, the presumptions in favor of the insured are binding in later proceedings:

> "if the judicial participation amounts to a default judgment or uncontested trial, this independent adjudicatory action obviates any concern re fraud or collusion, and *binds* the insurer in subsequent proceedings."

Cal. Prac. Guide, ¶ 12:661.1, citing *Pruyn*, 36 Cal. App. 4th at 527-28. Accordingly, where there is active judicial participation, a settlement may bind the insurer absent fraud or collusion. *See also* 1 Windt § 6.22, p. 429.

Lack of Standing No Defense. The consequences of a denial of coverage are applicable even where the insurance company has been denied standing in the underlying action between the injured party and the policyholder. *Tomassi*, 85 Cal.App.4th 1053.

Rulings. With this legal framework, the Court makes the following rulings:

1. The Joint Defendants insuring obligations were triggered by knowledge of asbestos liabilities potentially exceeding their attachment points and by Fuller-Austin's request that excess insurance companies participate in the handling and settling of the asbestos lawsuits – both prior to and after Fuller-Austin's bankruptcy.

2. Fuller-Austin's confirmed bankruptcy plan is a binding federal court judgment and adjudication that

establishes Fuller-Austin's liability and its legal obligations to pay damages to all pending and future asbestos claimants. It is not merely a stipulated judgment or settlement. The bankruptcy court's statutorily-required independent review and approval of the bankruptcy process constitutes "adequate judicial participation" so as to establish that the fact of Fuller-Austin's liability and the amount of Fuller-Austin's damages established in the bankruptcy proceeding are binding on Fuller-Austin and on the defendant insurance companies. *Pruyn*, 36 Cal.App.4th at 517; *Lynette C.*, 27 Cal.App.4th at 1449.

3. The Court finds that the "actual trial" requirement found in the "no-action" provision is not applicable to a lawsuit between a policyholder and its insurance companies. *Earth Elements*, 41 Cal.App.4th 110. In any event, the Court finds that the standards applied by the bankruptcy court would, as a matter of law, satisfy the "actual trial" requirement as it has been interpreted by California case law. *Pruyn*, 36 Cal.App.4th at 517; *Lynette C.*, 27 Cal.App.4th at 1449.

4. Fuller-Austin's insurance companies are obligated to pay the full allowed amount established by the federal court with respect to each asbestos claim, notwithstanding the fact that Fuller-Austin will only be able to pay a percentage of these values because of its bankrupt status. Such obligation was triggered at the time that the bankruptcy judgment was entered, subject to the determination of the aggregate value of this liability in this action and the resolution of any coverage defenses, which were reserved for this action.

5. The determination of the "aggregate value" of Fuller-Austin's liabilities to pending and future asbestos

claimants – *i.e.*, the dollar amount of the bankruptcy court judgment against Fuller-Austin – will be determined in the jury phase of this case, based on expert testimony and statistical evidence, as is typical in assessing damages in contract or tort disputes. The Court finds that Drs. Peterson and Florence qualify as experts on this subject matter and, further, that their methodologies satisfy the *Kelly* test for admissibility.

6. The asbestos liabilities adjudicated in the bankruptcy are presumed to be harm within coverage. *Armstrong*, 45 Cal. App. 4th at 85. It is Joint Defendants' burden at trial to prove otherwise.

7. The expenses incurred by the Fuller-Austin Settlement Trust in carrying out its obligations pursuant to the bankruptcy judgment, including start-up and operating expenses and the costs of establishing insurance coverage, are covered expenses under the "ultimate net loss" provisions contained in the policies.[20]

VIII. TRIGGERING DATES AND EVENTS

A. Overview of Dispute

Fuller-Austin contends that the Joint Defendants' insuring obligations arose prior to and as a result of Fuller-Austin's bankruptcy based on various events that

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[20] Based on the Court's prior Order on defendant Columbia Casualty's Motion for Summary Adjudication dated December 22, 1999, the following policies should be excluded from item 7 regarding the payment of Fuller-Austin's investigation, adjustment, defense or appeal costs or expenses: Columbia Casualty RDU 3652850, Columbia Casualty RDX 4170236, International XSI 7030, and Transcontinental policies RDX 00961 65 63, RDX 009 61 65 77, and RDX 009 61 65 05.

triggered their obligations. Joint Defendants dispute that their insuring obligations arose at anytime.

B. Court's Ruling on Triggering Events

Whether, and to what extent, certain events triggered the Joint Defendants' insuring obligations is largely a factual question that is reserved for the jury. Based on the rulings by the Court set forth above, the Court will apply the following standards to the jury phase of this proceeding in determining whether the Joint Defendants' insuring obligations were triggered.

1. An excess insurance company has a duty to cooperate in the defense of an underlying claim when it appears reasonably likely to involve its coverage. Exhaustion of underlying coverage is not a "condition precedent" to triggering an excess insurance company's obligations. *Schwartz*, 88 Cal.App.4th at 1335.

2. Notice of a liability that exceeds, or potentially exceeds, an excess insurance company's stated attachment point triggers coverage obligations. *Span*, 227 Cal.App.3d at 468, *Denny's*, 234 Cal. App. 3d 1794, *Benroth*, 132 F.Supp. at 275-76 (applying Louisiana law).

3. An excess insurance company has an obligation to evaluate proposed settlements, and to accept a reasonable settlement, where the liability penetrates, or potentially penetrates, the excess insurance company's level of coverage. *Diamond Heights*, 227 Cal.App.3d at 578; *Armstrong*, 45 Cal. App. 4th at 85; *Kelley*, 221 Cal. App. 2d at 563.

An insurance company's obligation to its policyholder does not end upon the filing of a lawsuit by the policyholder. *White*, 40 Cal.3d at 885.

These legal standards will establish the parties' rights and obligations in all later phases of this case.

IT IS SO ORDERED AND ADJUDGED.

Dated: August 6, 2002 /s/ Judith C. Chirlin
Honorable Judith C. Chirlin
Judge of the Superior Court

Filed 2/17/06

CERTIFIED FOR PARTIAL PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

FULLER-AUSTIN INSULATION COMPANY, Plaintiff and Respondent, v. HIGHLANDS INSURANCE COMPANY et al., Defendants and Appellants.	B170079 (Los Angeles County Super. Ct. No. BC116835) ORDER MODIFYING OPINION AND DENYING REHEARING [NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on January 19, 2006, be modified as follows:

On page 56, eighth line, at the end of the first paragraph, following the sentence ending "to settle the action," footnote No. 16 should be added stating: "Louisiana law is in accord. (E.g., *Lafauci v. Jenkins* (La.App. 1 Cir. 2003) 844 So.2d 19, 29; *Rogers v. Government Employees Ins. Co.* (La.App. 3 Cir. 1992) 598 So.2d 670, 672; *Bye v. American Income Life Insurance Company* (La.App. 1975) 316 So.2d 164, 166.)" All subsequent footnotes must be renumbered.

There is no change in the judgment.

Respondent's petition for rehearing is denied.

BOREN, P.J. DOI TODD, J. ASHMANN-GERST, J.

LEXSEE 2006 CAL. LEXIS 4783

FULLER-AUSTIN INSULATION COMPANY, Plaintiff and Respondent, v. HIGHLANDS INSURANCE COMPANY et al., Defendants and Appellants.

S141462

SUPREME COURT OF CALIFORNIA

2006 Cal. LEXIS 4783

April 19, 2006, Filed

PRIOR HISTORY: [*1] Second Appellate District, Division Two, No. B170079. *Fuller-Austin Insulation Co. v. Highlands Ins. Co.*, 135 Cal. App. 4th 958, 38 Cal. Rptr. 3d 716, 2006 Cal. App. LEXIS 45 (Cal. App. 2d Dist., 2006)

OPINION:

Petition for review denied & depublication request denied.

11 U.S.C. § 524. Effect of discharge

(a) A discharge in a case under this title –

(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived;

(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived; and

(3) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect or recover from, or offset against, property of the debtor of the kind specified in section 541(a)(2) of this title that is acquired after the commencement of the case, on account of any allowable community claim, except a community claim that is excepted from discharge under section 523, 1228(a)(1), or 1328(a)(1), or that would be so excepted, determined in accordance with the provisions of sections 523(c) and 523(d) of this title, in a case concerning the debtor's spouse commenced on the date of the filing of the petition in the case concerning the debtor, whether or not discharge of the debt based on such community claim is waived.

(b) Subsection (a)(3) of this section does not apply if –

(1)(A) the debtor's spouse is a debtor in a case under this title, or a bankrupt or a debtor in a case under the Bankruptcy Act, commenced within six years of the date of the filing of the petition in the case concerning the debtor; and

(B) the court does not grant the debtor's spouse a discharge in such case concerning the debtor's spouse; or

(2)(A) the court would not grant the debtor's spouse a discharge in a case under chapter 7 of this title concerning such spouse commenced on the date of the filing of the petition in the case concerning the debtor; and

(B) a determination that the court would not so grant such discharge is made by the bankruptcy court within the time and in the manner provided for a determination under section 727 of this title of whether a debtor is granted a discharge.

(c) An agreement between a holder of a claim and the debtor, the consideration for which, in whole or in part, is based on a debt that is dischargeable in a case under this title is enforceable only to any extent enforceable under applicable nonbankruptcy law, whether or not discharge of such debt is waived, only if –

(1) such agreement was made before the granting of the discharge under section 727, 1141, 1228, or 1328 of this title;

(2) the debtor received the disclosures described in subsection (k) at or before the time at which the debtor signed the agreement;

(3) such agreement has been filed with the court and, if applicable, accompanied by a declaration or an affidavit of the attorney that represented the debtor during the course of negotiating an agreement under this subsection, which states that –

(A) such agreement represents a fully informed and voluntary agreement by the debtor;

(B) such agreement does not impose an undue hardship on the debtor or a dependent of the debtor; and

(C) the attorney fully advised the debtor of the legal effect and consequences of –

(i) an agreement of the kind specified in this subsection; and

(ii) any default under such an agreement;

(4) the debtor has not rescinded such agreement at any time prior to discharge or within sixty days after such agreement is filed with the court, whichever occurs later, by giving notice of rescission to the holder of such claim;

(5) the provisions of subsection (d) of this section have been complied with; and

(6)(A) in a case concerning an individual who was not represented by an attorney during the course of negotiating an agreement under this subsection, the court approves such agreement as –

(i) not imposing an undue hardship on the debtor or a dependent of the debtor; and

(ii) in the best interest of the debtor.

(B) Subparagraph (A) shall not apply to the extent that such debt is a consumer debt secured by real property.

(d) In a case concerning an individual, when the court has determined whether to grant or not to grant a discharge under section 727, 1141, 1228, or 1328 of this title, the court may hold a hearing at which the debtor shall appear in person. At any such hearing, the court shall inform the debtor that a discharge has been granted or the

reason why a discharge has not been granted. If a discharge has been granted and if the debtor desires to make an agreement of the kind specified in subsection (c) of this section and was not represented by an attorney during the course of negotiating such agreement, then the court shall hold a hearing at which the debtor shall appear in person and at such hearing the court shall –

(1) inform the debtor –

(A) that such an agreement is not required under this title, under nonbankruptcy law, or under any agreement not made in accordance with the provisions of subsection (c) of this section; and

(B) of the legal effect and consequences of –

(i) an agreement of the kind specified in subsection (c) of this section; and

(ii) a default under such an agreement; and

(2) determine whether the agreement that the debtor desires to make complies with the requirements of subsection (c)(6) of this section, if the consideration for such agreement is based in whole or in part on a consumer debt that is not secured by real property of the debtor.

(e) Except as provided in subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.

(f) Nothing contained in subsection (c) or (d) of this section prevents a debtor from voluntarily repaying any debt.

(g)(1)(A) After notice and hearing, a court that enters an order confirming a plan of reorganization under chapter 11 may issue, in connection with such order, an injunction in accordance with this subsection to supplement the injunctive effect of a discharge under this section.

(B) An injunction may be issued under subparagraph (A) to enjoin entities from taking legal action for the purpose of directly or indirectly collecting, recovering, or receiving payment or recovery with respect to any claim or demand that, under a plan of reorganization, is to be paid in whole or in part by a trust described in paragraph (2)(B)(i), except such legal actions as are expressly allowed by the injunction, the confirmation order, or the plan of reorganization.

(2)(A) Subject to subsection (h), if the requirements of subparagraph (B) are met at the time an injunction described in paragraph (1) is entered, then after entry of such injunction, any proceeding that involves the validity, application, construction, or modification of such injunction, or of this subsection with respect to such injunction, may be commenced only in the district court in which such injunction was entered, and such court shall have exclusive jurisdiction over any such proceeding without regard to the amount in controversy.

(B) The requirements of this subparagraph are that –

(i) the injunction is to be implemented in connection with a trust that, pursuant to the plan of reorganization –

(I) is to assume the liabilities of a debtor which at the time of entry of the order for relief has been named as a defendant in personal injury, wrongful death, or property-damage actions seeking

recovery for damages allegedly caused by the presence of, or exposure to, asbestos or asbestos-containing products;

(II) is to be funded in whole or in part by the securities of 1 or more debtors involved in such plan and by the obligation of such debtor or debtors to make future payments, including dividends;

(III) is to own, or by the exercise of rights granted under such plan would be entitled to own if specified contingencies occur, a majority of the voting shares of –

(aa) each such debtor;

(bb) the parent corporation of each such debtor; or

(cc) a subsidiary of each such debtor that is also a debtor; and

(IV) is to use its assets or income to pay claims and demands; and

(ii) subject to subsection (h), the court determines that –

(I) the debtor is likely to be subject to substantial future demands for payment arising out of the same or similar conduct or events that gave rise to the claims that are addressed by the injunction;

(II) the actual amounts, numbers, and timing of such future demands cannot be determined;

(III) pursuit of such demands outside the procedures prescribed by such plan is likely to threaten the plan's purpose to deal equitably with claims and future demands;

(IV) as part of the process of seeking confirmation of such plan –

(aa) the terms of the injunction proposed to be issued under paragraph (1)(A), including any provisions barring actions against third parties pursuant to paragraph (4)(A), are set out in such plan and in any disclosure statement supporting the plan; and

(bb) a separate class or classes of the claimants whose claims are to be addressed by a trust described in clause (i) is established and votes, by at least 75 percent of those voting, in favor of the plan; and

(V) subject to subsection (h), pursuant to court orders or otherwise, the trust will operate through mechanisms such as structured, periodic, or supplemental payments, pro rata distributions, matrices, or periodic review of estimates of the numbers and values of present claims and future demands, or other comparable mechanisms, that provide reasonable assurance that the trust will value, and be in a financial position to pay, present claims and future demands that involve similar claims in substantially the same manner.

(3)(A) If the requirements of paragraph (2)(B) are met and the order confirming the plan of reorganization was issued or affirmed by the district court that has jurisdiction over the reorganization case, then after the time for appeal of the order that issues or affirms the plan –

(i) the injunction shall be valid and enforceable and may not be revoked or modified by any court except through appeal in accordance with paragraph (6);

(ii) no entity that pursuant to such plan or thereafter becomes a direct or indirect transferee of, or successor to any assets of, a debtor or trust that is the subject of the injunction shall be liable with respect to any claim or demand made against such entity by reason of its becoming such a transferee or successor; and

(iii) no entity that pursuant to such plan or thereafter makes a loan to such a debtor or trust or to such a successor or transferee shall, by reason of making the loan, be liable with respect to any claim or demand made against such entity, nor shall any pledge of assets made in connection with such a loan be upset or impaired for that reason;

(B) Subparagraph (A) shall not be construed to –

(i) imply that an entity described in subparagraph (A)(ii) or (iii) would, if this paragraph were not applicable, necessarily be liable to any entity by reason of any of the acts described in subparagraph (A);

(ii) relieve any such entity of the duty to comply with, or of liability under, any Federal or State law regarding the making of a fraudulent conveyance in a transaction described in subparagraph (A)(ii) or (iii); or

(iii) relieve a debtor of the debtor's obligation to comply with the terms of the plan of reorganization, or affect the power of the court to exercise its authority under sections 1141 and 1142 to compel the debtor to do so.

(4)(A)(i) Subject to subparagraph (B), an injunction described in paragraph (1) shall be valid

and enforceable against all entities that it addresses.

(ii) Notwithstanding the provisions of section 524(e), such an injunction may bar any action directed against a third party who is identifiable from the terms of such injunction (by name or as part of an identifiable group) and is alleged to be directly or indirectly liable for the conduct of, claims against, or demands on the debtor to the extent such alleged liability of such third party arises by reason of –

> **(I)** the third party's ownership of a financial interest in the debtor, a past or present affiliate of the debtor, or a predecessor in interest of the debtor;
>
> **(II)** the third party's involvement in the management of the debtor or a predecessor in interest of the debtor, or service as an officer, director or employee of the debtor or a related party;
>
> **(III)** the third party's provision of insurance to the debtor or a related party; or
>
> **(IV)** the third party's involvement in a transaction changing the corporate structure, or in a loan or other financial transaction affecting the financial condition, of the debtor or a related party, including but not limited to –
>
> > **(aa)** involvement in providing financing (debt or equity), or advice to an entity involved in such a transaction; or
> >
> > **(bb)** acquiring or selling a financial interest in an entity as part of such a transaction.

(iii) As used in this subparagraph, the term "related party" means –

(I) a past or present affiliate of the debtor;

(II) a predecessor in interest of the debtor; or

(III) any entity that owned a financial interest in –

(aa) the debtor;

(bb) a past or present affiliate of the debtor; or

(cc) a predecessor in interest of the debtor.

(B) Subject to subsection (h), if, under a plan of reorganization, a kind of demand described in such plan is to be paid in whole or in part by a trust described in paragraph (2)(B)(i) in connection with which an injunction described in paragraph (1) is to be implemented, then such injunction shall be valid and enforceable with respect to a demand of such kind made, after such plan is confirmed, against the debtor or debtors involved, or against a third party described in subparagraph (A)(ii), if –

(i) as part of the proceedings leading to issuance of such injunction, the court appoints a legal representative for the purpose of protecting the rights of persons that might subsequently assert demands of such kind, and

(ii) the court determines, before entering the order confirming such plan, that identifying such debtor or debtors, or such third party (by name or as part of an identifiable

group), in such injunction with respect to such demands for purposes of this subparagraph is fair and equitable with respect to the persons that might subsequently assert such demands, in light of the benefits provided, or to be provided, to such trust on behalf of such debtor or debtors or such third party.

(5) In this subsection, the term "demand" means a demand for payment, present or future, that –

(A) was not a claim during the proceedings leading to the confirmation of a plan of reorganization;

(B) arises out of the same or similar conduct or events that gave rise to the claims addressed by the injunction issued under paragraph (1); and

(C) pursuant to the plan, is to be paid by a trust described in paragraph (2)(B)(i).

(6) Paragraph (3)(A)(i) does not bar an action taken by or at the direction of an appellate court on appeal of an injunction issued under paragraph (1) or of the order of confirmation that relates to the injunction.

(7) This subsection does not affect the operation of section 1144 or the power of the district court to refer a proceeding under section 157 of title 28 or any reference of a proceeding made prior to the date of the enactment of this subsection.

(h) Application to existing injunctions. – For purposes of subsection (g) –

(1) subject to paragraph (2), if an injunction of the kind described in subsection (g)(1)(B) was issued before the date of the enactment of this Act, as part of a plan of reorganization confirmed by an order entered

before such date, then the injunction shall be considered to meet the requirements of subsection (g)(2)(B) for purposes of subsection (g)(2)(A), and to satisfy subsection (g)(4)(A)(ii), if –

(A) the court determined at the time the plan was confirmed that the plan was fair and equitable in accordance with the requirements of section 1129(b);

(B) as part of the proceedings leading to issuance of such injunction and confirmation of such plan, the court had appointed a legal representative for the purpose of protecting the rights of persons that might subsequently assert demands described in subsection (g)(4)(B) with respect to such plan; and

(C) such legal representative did not object to confirmation of such plan or issuance of such injunction; and

(2) for purposes of paragraph (1), if a trust described in subsection (g)(2)(B)(i) is subject to a court order on the date of the enactment of this Act staying such trust from settling or paying further claims –

(A) the requirements of subsection (g)(2)(B)(ii)(V) shall not apply with respect to such trust until such stay is lifted or dissolved; and

(B) if such trust meets such requirements on the date such stay is lifted or dissolved, such trust shall be considered to have met such requirements continuously from the date of the enactment of this Act.

(i) The willful failure of a creditor to credit payments received under a plan confirmed under this title, unless the order confirming the plan is revoked, the plan is in

default, or the creditor has not received payments required to be made under the plan in the manner required by the plan (including crediting the amounts required under the plan), shall constitute a violation of an injunction under subsection (a)(2) if the act of the creditor to collect and failure to credit payments in the manner required by the plan caused material injury to the debtor.

(j) Subsection (a)(2) does not operate as an injunction against an act by a creditor that is the holder of a secured claim, if –

> **(1)** such creditor retains a security interest in real property that is the principal residence of the debtor;
>
> **(2)** such act is in the ordinary course of business between the creditor and the debtor; and
>
> **(3)** such act is limited to seeking or obtaining periodic payments associated with a valid security interest in lieu of pursuit of in rem relief to enforce the lien.

(k)(1) The disclosures required under subsection (c)(2) shall consist of the disclosure statement described in paragraph (3), completed as required in that paragraph, together with the agreement specified in subsection (c), statement, declaration, motion and order described, respectively, in paragraphs (4) through (8), and shall be the only disclosures required in connection with entering into such agreement.

> **(2)** Disclosures made under paragraph (1) shall be made clearly and conspicuously and in writing. The terms "Amount Reaffirmed" and "Annual Percentage Rate" shall be disclosed more conspicuously than other terms, data or information provided in connection with this disclosure, except that the phrases

"Before agreeing to reaffirm a debt, review these important disclosures" and "Summary of Reaffirmation Agreement" may be equally conspicuous. Disclosures may be made in a different order and may use terminology different from that set forth in paragraphs (2) through (8), except that the terms "Amount Reaffirmed" and "Annual Percentage Rate" must be used where indicated.

(3) The disclosure statement required under this paragraph shall consist of the following:

(A) The statement: "Part A: Before agreeing to reaffirm a debt, review these important disclosures:";

(B) Under the heading "Summary of Reaffirmation Agreement", the statement: "This Summary is made pursuant to the requirements of the Bankruptcy Code";

(C) The "Amount Reaffirmed", using that term, which shall be –

(i) the total amount of debt that the debtor agrees to reaffirm by entering into an agreement of the kind specified in subsection (c), and

(ii) the total of any fees and costs accrued as of the date of the disclosure statement, related to such total amount.

(D) In conjunction with the disclosure of the "Amount Reaffirmed", the statements –

(i) "The amount of debt you have agreed to reaffirm"; and

(ii) "Your credit agreement may obligate you to pay additional amounts which may

come due after the date of this disclosure. Consult your credit agreement."

(E) The "Annual Percentage Rate", using that term, which shall be disclosed as –

(i) if, at the time the petition is filed, the debt is an extension of credit under an open end credit plan, as the terms "credit" and "open end credit plan" are defined in section 103 of the Truth in Lending Act, then –

(I) the annual percentage rate determined under paragraphs (5) and (6) of section 127(b) of the Truth in Lending Act, as applicable, as disclosed to the debtor in the most recent periodic statement prior to entering into an agreement of the kind specified in subsection (c) or, if no such periodic statement has been given to the debtor during the prior 6 months, the annual percentage rate as it would have been so disclosed at the time the disclosure statement is given to the debtor, or to the extent this annual percentage rate is not readily available or not applicable, then

(II) the simple interest rate applicable to the amount reaffirmed as of the date the disclosure statement is given to the debtor, or if different simple interest rates apply to different balances, the simple interest rate applicable to each such balance, identifying the amount of each such balance included in the amount reaffirmed, or

(III) if the entity making the disclosure elects, to disclose the annual percentage rate under subclause (I) and the simple interest rate under subclause (II); or

(ii) if, at the time the petition is filed, the debt is an extension of credit other than under an open end credit plan, as the terms "credit" and "open end credit plan" are defined in section 103 of the Truth in Lending Act, then –

(I) the annual percentage rate under section 128(a)(4) of the Truth in Lending Act, as disclosed to the debtor in the most recent disclosure statement given to the debtor prior to the entering into an agreement of the kind specified in subsection (c) with respect to the debt, or, if no such disclosure statement was given to the debtor, the annual percentage rate as it would have been so disclosed at the time the disclosure statement is given to the debtor, or to the extent this annual percentage rate is not readily available or not applicable, then

(II) the simple interest rate applicable to the amount reaffirmed as of the date the disclosure statement is given to the debtor, or if different simple interest rates apply to different balances, the simple interest rate applicable to each such balance, identifying the amount of such balance included in the amount reaffirmed, or

(III) if the entity making the disclosure elects, to disclose the annual percentage rate under (I) and the simple interest rate under (II).

(F) If the underlying debt transaction was disclosed as a variable rate transaction on the most recent disclosure given under the Truth in Lending Act, by stating "The interest rate on your loan may be a variable interest rate which changes from time to time, so that the annual percentage rate disclosed here may be higher or lower."

(G) If the debt is secured by a security interest which has not been waived in whole or in part or determined to be void by a final order of the court at the time of the disclosure, by disclosing that a security interest or lien in goods or property is asserted over some or all of the debts the debtor is reaffirming and listing the items and their original purchase price that are subject to the asserted security interest, or if not a purchase-money security interest then listing by items or types and the original amount of the loan.

(H) At the election of the creditor, a statement of the repayment schedule using 1 or a combination of the following –

(i) by making the statement: "Your first payment in the amount of $___ is due on ___ but the future payment amount may be different. Consult your reaffirmation agreement or credit agreement, as applicable.", and stating the amount of the first payment and the due date of that payment in the places provided;

(ii) by making the statement: "Your payment schedule will be:", and describing the repayment schedule with the number, amount, and due dates or period of payments scheduled to repay

the debts reaffirmed to the extent then known by the disclosing party; or

(iii) by describing the debtor's repayment obligations with reasonable specificity to the extent then known by the disclosing party.

(I) The following statement: "Note: When this disclosure refers to what a creditor 'may' do, it does not use the word 'may' to give the creditor specific permission. The word 'may' is used to tell you what might occur if the law permits the creditor to take the action. If you have questions about your reaffirming a debt or what the law requires, consult with the attorney who helped you negotiate this agreement reaffirming a debt. If you don't have an attorney helping you, the judge will explain the effect of your reaffirming a debt when the hearing on the reaffirmation agreement is held."

(J)(i) The following additional statements:

"Reaffirming a debt is a serious financial decision. The law requires you to take certain steps to make sure the decision is in your best interest. If these steps are not completed, the reaffirmation agreement is not effective, even though you have signed it.

"1. Read the disclosures in this Part A carefully. Consider the decision to reaffirm carefully. Then, if you want to reaffirm, sign the reaffirmation agreement in Part B (or you may use a separate agreement you and your creditor agree on).

"2. Complete and sign Part D and be sure you can afford to make the payments you are agreeing to make and have received a copy of the disclosure statement and a completed and signed reaffirmation agreement.

"3. If you were represented by an attorney during the negotiation of your reaffirmation agreement, the attorney must have signed the certification in Part C.

"4. If you were not represented by an attorney during the negotiation of your reaffirmation agreement, you must have completed and signed Part E.

"5. The original of this disclosure must be filed with the court by you or your creditor. If a separate reaffirmation agreement (other than the one in Part B) has been signed, it must be attached.

"6. If you were represented by an attorney during the negotiation of your reaffirmation agreement, your reaffirmation agreement becomes effective upon filing with the court unless the reaffirmation is presumed to be an undue hardship as explained in Part D.

"7. If you were not represented by an attorney during the negotiation of your reaffirmation agreement, it will not be effective unless the court approves it. The court will notify you of the hearing on your reaffirmation agreement. You must attend this hearing in bankruptcy court where the judge will review your reaffirmation agreement. The bankruptcy court must approve your reaffirmation agreement as consistent with your best interests, except that no court approval is required if your reaffirmation agreement is for a consumer debt secured by a mortgage, deed of trust, security deed, or other lien on your real property, like your home.

"Your right to rescind (cancel) your reaffirmation agreement. You may rescind (cancel) your reaffirmation agreement at any time before the bankruptcy

court enters a discharge order, or before the expiration of the 60-day period that begins on the date your reaffirmation agreement is filed with the court, whichever occurs later. To rescind (cancel) your reaffirmation agreement, you must notify the creditor that your reaffirmation agreement is rescinded (or canceled).

"What are your obligations if you reaffirm the debt? A reaffirmed debt remains your personal legal obligation. It is not discharged in your bankruptcy case. That means that if you default on your reaffirmed debt after your bankruptcy case is over, your creditor may be able to take your property or your wages. Otherwise, your obligations will be determined by the reaffirmation agreement which may have changed the terms of the original agreement. For example, if you are reaffirming an open end credit agreement, the creditor may be permitted by that agreement or applicable law to change the terms of that agreement in the future under certain conditions.

"Are you required to enter into a reaffirmation agreement by any law? No, you are not required to reaffirm a debt by any law. Only agree to reaffirm a debt if it is in your best interest. Be sure you can afford the payments you agree to make.

"What if your creditor has a security interest or lien? Your bankruptcy discharge does not eliminate any lien on your property. A 'lien' is often referred to as a security interest, deed of trust, mortgage or security deed. Even if you do not reaffirm and your personal liability on the debt is discharged, because of the lien your creditor may still have the right to take the security property if you do not pay the debt or default on it. If the lien is on an item of personal property that is exempt under your State's law or that the trustee has abandoned, you may be able to redeem

the item rather than reaffirm the debt. To redeem, you make a single payment to the creditor equal to the current value of the security property, as agreed by the parties or determined by the court."

(ii) In the case of a reaffirmation under subsection (m)(2), numbered paragraph 6 in the disclosures required by clause (i) of this subparagraph shall read as follows:

"6. If you were represented by an attorney during the negotiation of your reaffirmation agreement, your reaffirmation agreement becomes effective upon filing with the court."

(4) The form of such agreement required under this paragraph shall consist of the following:

"Part B: Reaffirmation Agreement. I (we) agree to reaffirm the debts arising under the credit agreement described below.

"Brief description of credit agreement:

"Description of any changes to the credit agreement made as part of this reaffirmation agreement:

"Signature: Date:

"Borrower:

"Co-borrower, if also reaffirming these debts:

"Accepted by creditor:

"Date of creditor acceptance:".

(5) The declaration shall consist of the following:

(A) The following certification:

"Part C: Certification by Debtor's Attorney (If Any).

"I hereby certify that (1) this agreement represents a fully informed and voluntary agreement by the debtor; (2) this agreement does not impose an undue hardship on the debtor or any dependent of the debtor; and (3) I have fully advised the debtor of the legal effect and consequences of this agreement and any default under this agreement.

"Signature of Debtor's Attorney: Date:".

(B) If a presumption of undue hardship has been established with respect to such agreement, such certification shall state that in the opinion of the attorney, the debtor is able to make the payment.

(C) In the case of a reaffirmation agreement under subsection (m)(2), subparagraph (B) is not applicable.

(6)(A) The statement in support of such agreement, which the debtor shall sign and date prior to filing with the court, shall consist of the following:

"Part D: Debtor's Statement in Support of Reaffirmation Agreement.

"1. I believe this reaffirmation agreement will not impose an undue hardship on my dependents or me. I can afford to make the payments on the reaffirmed debt because my monthly income (take home pay plus any other income received) is $___, and my actual current monthly expenses including monthly payments on post-bankruptcy debt and other reaffirmation agreements total $___, leaving $___ to make the required payments on this reaffirmed debt. I understand that if my income less my monthly expenses does not leave enough to make the payments, this reaffirmation agreement is presumed to be an undue hardship on me and must be reviewed by the court.

However, this presumption may be overcome if I explain to the satisfaction of the court how I can afford to make the payments here: ___.

"2. I received a copy of the Reaffirmation Disclosure Statement in Part A and a completed and signed reaffirmation agreement."

(B) Where the debtor is represented by an attorney and is reaffirming a debt owed to a creditor defined in section 19(b)(1)(A)(iv) of the Federal Reserve Act, the statement of support of the reaffirmation agreement, which the debtor shall sign and date prior to filing with the court, shall consist of the following:

"I believe this reaffirmation agreement is in my financial interest. I can afford to make the payments on the reaffirmed debt. I received a copy of the Reaffirmation Disclosure Statement in Part A and a completed and signed reaffirmation agreement."

(7) The motion that may be used if approval of such agreement by the court is required in order for it to be effective, shall be signed and dated by the movant and shall consist of the following:

"Part E: Motion for Court Approval (To be completed only if the debtor is not represented by an attorney.). I (we), the debtor(s), affirm the following to be true and correct:

"I am not represented by an attorney in connection with this reaffirmation agreement.

"I believe this reaffirmation agreement is in my best interest based on the income and expenses I have disclosed in my Statement in Support of this reaffirmation agreement, and because (provide any additional relevant reasons the court should consider):

"Therefore, I ask the court for an order approving this reaffirmation agreement."

(8) The court order, which may be used to approve such agreement, shall consist of the following:

"Court Order: The court grants the debtor's motion and approves the reaffirmation agreement described above."

(l) Notwithstanding any other provision of this title the following shall apply:

(1) A creditor may accept payments from a debtor before and after the filing of an agreement of the kind specified in subsection (c) with the court.

(2) A creditor may accept payments from a debtor under such agreement that the creditor believes in good faith to be effective.

(3) The requirements of subsections (c)(2) and (k) shall be satisfied if disclosures required under those subsections are given in good faith.

(m)(1) Until 60 days after an agreement of the kind specified in subsection (c) is filed with the court (or such additional period as the court, after notice and a hearing and for cause, orders before the expiration of such period), it shall be presumed that such agreement is an undue hardship on the debtor if the debtor's monthly income less the debtor's monthly expenses as shown on the debtor's completed and signed statement in support of such agreement required under subsection (k)(6)(A) is less than the scheduled payments on the reaffirmed debt. This presumption shall be reviewed by the court. The presumption may be rebutted in writing by the debtor if the statement includes an explanation that identifies additional sources of funds to make the payments as agreed upon under the

terms of such agreement. If the presumption is not rebutted to the satisfaction of the court, the court may disapprove such agreement. No agreement shall be disapproved without notice and a hearing to the debtor and creditor, and such hearing shall be concluded before the entry of the debtor's discharge.

(2) This subsection does not apply to reaffirmation agreements where the creditor is a credit union, as defined in section 19(b)(1)(A)(iv) of the Federal Reserve Act.

H.R. REP. 103-835, 1994 U.S.C.C.A.N. 3340, *3348-49

HOUSE REPORT NO. 103-835

October 4, 1994

[To accompany H.R. 5116]

Section 111. Bankruptcy court injunctions.

This section adds a new subsection (g) to section 524 of the Code, establishing a procedure for dealing in a chapter 11 reorganization proceeding with future personal injury claims against the debtor based on exposure to asbestos-containing products. The procedure involves the establishment of a trust to pay the future claims, coupled with an injunction to prevent future claimants from suing the debtor.

The procedure is modeled on the trust-injunction in the Johns-Manville case, which pioneered the approach a decade ago in response to the flood of asbestos lawsuits it was facing. Asbestos-related disease has a long latency period – up to 30 years or more – and many of the exposures from the 1940's, when asbestos was in widespread use as an insulating material, had become the personal injury lawsuits of the 1970's and 1980's. In 1982, when Johns-Manville filed for bankruptcy, it had been named in 12,500 lawsuits; and epidemiologists estimated that 50,000 to 100,000 more could be expected, with a potential liability totaling $2 billion.

From the beginning, a central element of the case was how to deal with future claimants – those who were not yet before the court, because their disease had not yet manifested itself. The parties in the Manville case devised a creative solution to help protect the future asbestos claimants, in the form of a trust into which would be placed stock of the emerging debtor company and a portion

of future profits, along with contributions from Johns-Manville's insurers. Present, as well as future, asbestos personal injury claimants would bring their actions against the trust. In connection with the trust, an injunction would be issued barring new asbestos claims against the emerging debtor company. Asbestos claimants would have a stake in Johns-Manville's successful reorganization, because the company's success would increase both the value of the stock held by the trust and the company profits set aside for it.

The bankruptcy court appointed a special representative for the future claimants; this special representative was centrally involved in formulating the plan and negotiating support for it among the other creditors. The Johns-Manville plan was confirmed and upheld on appeal.[FN8] Nevertheless, lingering uncertainty in the financial community as to whether the injunction can withstand all challenges has apparently made it more difficult for the company to meet its needs for capital and has depressed the value of its stock. This has undermined the "fresh start" objectives of bankruptcy and the goals of the trust arrangement.

Meanwhile, following Johns-Manville's lead, another asbestos manufacturer, UNR, has resolved its chapter 11 reorganization with a similar trust/injunction arrangement. And other asbestos manufacturers are reportedly considering the same approach.

The Committee remains concerned that full consideration be accorded to the interests of future claimants, who, by definition, do not have their own voice. Nevertheless, the Committee also recognizes that the interests of future claimants are ill-served if Johns-Manville and other asbestos companies are forced into liquidation and lose

their ability to generate stock value and profits that can be used to satisfy claims. Thus, the tension present in the trust/injunction mechanism is not unlike the tension present in bankruptcy generally.

The Committee has approved section 111 of the bill in order to strengthen the Manville and UNR trust/injunction mechanisms and to offer similar certitude to other asbestos trust/injunction mechanisms that meet the same kind of high standards with respect to regard for the rights of claimants, present and future, as displayed in the two pioneering cases. The Committee believes Johns-Manville and UNR were aided in meeting these high standards, in part at least, by the perceived legal uncertainty surrounding this mechanism, which created strong incentives to take exceptional precautions at every stage of the proceeding. The Committee has concluded, therefore, that creating greater certitude regarding the validity of the trust/injunction mechanism must be accompanied by explicit requirements simulating those met in the Manville case.

Seciton 111 requires, in order for present claimants to be bound by a trust/injunction, that the trust have the capability of owning a majority of the shares of the debtor or its parent or of a subsidiary; that the debtor prove that it is likely to be subject to substantial future asbestos claims, the number of which cannot be easily predicted; and that the trust is needed in order to deal equitably with present and future claims; and that a separate creditor class be established for those with present claims, which must vote by a 75 percent margin to approve the plan.

In order for future claimants to be bound by a trust/injunction, section 111 requires that the trust operate in a structure and manner necessary to give reasonable

assurance that the trust will value, and be able to pay, similar present and future claims in substantially the same manner.

The asbestos trust/injunction mechanism established in the bill is available for use by any asbestos company facing a similarly overwhelming liability. It is written, however, so that Johns-Manville and UNR, both of which have met and surpassed the standards imposed in this section, will be able to take advantage of the certainty it provides without having to reopen their cases.

THIS SOLICITATION IS BEING CONDUCTED TO OBTAIN SUFFICIENT ACCEPTANCES OF A PLAN OF REORGANIZATION *BEFORE* THE FILING OF A VOLUNTARY REORGANIZATION CASE UNDER CHAPTER 11 OF THE BANKRUPTCY CODE. BECAUSE A CHAPTER 11 CASE HAS NOT YET BEEN COMMENCED, THIS DISCLOSURE STATEMENT HAS NOT BEEN APPROVED BY THE BANKRUPTCY COURT AS CONTAINING ADEQUATE INFORMATION WITHIN THE MEANING OF SECTION 1125(a) OF THE BANKRUPTCY CODE. FOLLOWING THE COMMENCEMENT OF ITS CHAPTER 11 CASE, FULLER-AUSTIN EXPECTS TO PROMPTLY SEEK AN ORDER OF THE BANKRUPTCY COURT (A) APPROVING THIS DISCLOSURE STATEMENT AS HAVING CONTAINED ADEQUATE INFORMATION AND THE SOLICITATION OF VOTES AS HAVING BEEN IN COMPLIANCE WITH SECTION 1126(b) OF THE BANKRUPTCY CODE; AND (B) CONFIRMING ITS PLAN OF REORGANIZATION.

DISCLOSURE STATEMENT WITH RESPECT TO PLAN OF REORGANIZATION UNDER CHAPTER 11 OF THE UNITED STATES BANKRUPTCY CODE FOR FULLER-AUSTIN INSULATION COMPANY

DATED JULY 8, 1998

THE VOTING DEADLINE TO ACCEPT OR REJECT THE PLAN OF REORGANIZATION IS 5:00 P.M., EASTERN TIME, ON AUGUST 31, 1998, UNLESS EXTENDED

HOLDERS OF CLAIMS AGAINST FULLER-AUSTIN ARE ENCOURAGED TO READ AND CAREFULLY CONSIDER THE MATTERS DESCRIBED IN THIS DISCLOSURE STATEMENT UNDER "RISK

FACTORS" PRIOR TO VOTING. IN MAKING HIS VOTING DECISION, EACH HOLDER MUST RELY ON HIS OWN EXAMINATION OF FULLER-AUSTIN AND THE TERMS OF THE PLAN OF REORGANIZATION, INCLUDING THE MERITS AND RISKS INVOLVED. EACH HOLDER OF A CLAIM SHOULD CONSULT SUCH HOLDER'S ATTORNEY AND ACCOUNTANT AS TO THE EFFECT OF THE PLAN ON SUCH HOLDER, INCLUDING, BUT NOT LIMITED TO, THE TAX EFFECTS OF THE PLAN.

THIS DISCLOSURE STATEMENT MAY NOT BE RELIED UPON FOR ANY PURPOSE OTHER THAN TO DETERMINE WHETHER TO VOTE IN FAVOR OF OR AGAINST THE PLAN, AND NOTHING CONTAINED HEREIN SHALL CONSTITUTE AN ADMISSION OF ANY FACT OR LIABILITY BY ANY PARTY, OR BE ADMISSIBLE IN ANY PROCEEDING INVOLVING FULLER-AUSTIN OR ANY OTHER PARTY, OR BE DEEMED EVIDENCE OF THE TAX OR OTHER LEGAL CONSEQUENCES OR EFFECTS OF THE REORGANIZATION OF FULLER-AUSTIN. CERTAIN INFORMATION CONTAINED IN THE DISCLOSURE STATEMENT, BY ITS NATURE, IS A FORECAST OF FUTURE EVENTS AND THEREFORE INCLUDES ESTIMATES, ASSUMPTIONS AND PROJECTIONS WHICH MAY PROVE TO BE WRONG, OR WHICH MAY BE MATERIALLY DIFFERENT FROM ACTUAL FUTURE RESULTS.

NO STATEMENT OR INFORMATION CONCERNING FULLER-AUSTIN (PARTICULARLY AS TO FUTURE BUSINESS, RESULTS OF OPERATIONS OR FINANCIAL CONDITION OR WITH RESPECT TO DISTRIBUTIONS TO BE MADE UNDER THE

PLAN) OR ITS ASSETS, PROPERTIES OR BUSINESS THAT IS GIVEN FOR THE PURPOSE OF SOLICITING ACCEPTANCES OF THE PLAN IS AUTHORIZED, OTHER THAN AS SET FORTH IN THIS DISCLOSURE STATEMENT. THE STATEMENTS AND INFORMATION ABOUT FULLER-AUSTIN, INCLUDING FINANCIAL INFORMATION, FINANCIAL PROJECTIONS AND INFORMATION REGARDING CLAIMS OR INTERESTS CONTAINED HEREIN, HAVE BEEN PREPARED FROM INFORMATION PROVIDED BY FULLER-AUSTIN, DYNCORP, THE COMMITTEE, THE LEGAL REPRESENTATIVE AND THEIR PROFESSIONALS.

THE STATEMENTS CONTAINED IN THIS DISCLOSURE STATEMENT ARE MADE AS OF THE DATE HEREOF UNLESS OTHERWISE SPECIFIED.

THE TERMS OF THE PLAN GOVERN IN THE EVENT OF ANY INCONSISTENCY WITH THE SUMMARIES IN THIS DISCLOSURE STATEMENT.

* * *

INTRODUCTORY STATEMENT

Fuller-Austin is soliciting acceptances of its chapter 11 plan of reorganization attached as Exhibit A to this Disclosure Statement. This solicitation is being conducted at this time in order to obtain (prior to the commencement of a chapter 11 case) sufficient acceptances to enable the Plan to be confirmed by the Bankruptcy Court pursuant to the provisions of the Bankruptcy Code. Fuller-Austin anticipates that a pre-commencement solicitation will significantly simplify, shorten, and reduce the cost of the administration of its Reorganization Case. Capitalized terms used herein shall have the meanings assigned to

them in the Glossary of Terms for the Plan Documents Pursuant to the Plan of Reorganization Under Chapter 11 of the United States Bankruptcy Code for Fuller-Austin Insulation Company, which is attached hereto as Schedule I; such definitions are incorporated herein by reference.

Fuller-Austin is commencing this solicitation after several months of discussions with (a) an informal committee of known, present holders of Asbestos Claims; (b) the Legal Representative for unknown, future holders of Asbestos Claims; (c) the Asbestos Insurance Companies; and (d) DynCorp.

The Plan is the product of negotiations among Fuller-Austin, DynCorp, members of the Committee, the Legal Representative and the Asbestos Insurance Companies. Fuller-Austin and the Committee strongly support the Plan, and Fuller-Austin strongly urges you to vote to accept the Plan. As the letter accompanying this Disclosure Statement indicates, the Committee also recommends that you vote to accept the Plan.

SUMMARY OF VOTING PROCEDURES

Fuller-Austin has sent to all of its known holders of Claims and Interests who are in Classes impaired under the Plan ballots with voting instructions and copies of this Disclosure Statement. Holders of Claims and Interests should read the ballot carefully and follow the voting instructions. Holders of Claims and Interests should only use the official ballot that accompanies this Disclosure Statement.

In order to be counted for voting purposes, ballots for the acceptance or rejection of the Plan must be received by Fuller-Austin's balloting agent Kathleen M. Logan (the "Balloting Agent") no later than 5:00 p.m., Eastern Time, on August 31, 1998, at the following address:

Logan & Company, Inc.
615 Washington Street
Hoboken, N.J. 07030
Telephone: (201) 798-1031

If you are a holder of a Claim or an Interest entitled to vote on the Plan and did not receive a ballot, received a damaged ballot or lost your ballot, you should contact the Balloting Agent. If you have any questions about this Disclosure Statement, the Plan or the procedures for voting on the Plan, you should contact your attorney or Fuller-Austin's attorney, James L. Patton, Jr.

For detailed voting instructions, *see* Section 5.1(b) below, and the instructions accompanying your ballot.

OVERVIEW OF THE PLAN

The following is a brief summary of certain information contained elsewhere in this Disclosure Statement and in the Plan. The summary is necessarily incomplete and is qualified in its entirety by reference to the more detailed information appearing elsewhere in this Disclosure Statement and the exhibits hereto, and the Plan Documents.

The Plan is the product of intensive efforts, over a period of nine months, by Fuller-Austin, DynCorp, the Committee, the Legal Representative and certain of the Asbestos Insurance Companies, to negotiate a plan of

reorganization for Fuller-Austin that is fair and equitable to all parties in interest. Consistent with these objectives, Fuller-Austin believes that considering all of the facts and circumstances underlying the Reorganization Case, the Plan provides for the maximum recoveries to, and the expeditious and equitable treatment of, holders of all Claims, including holders of Asbestos Claims.

The essential elements of the reorganization contemplated by the Plan include, among other things:

(a) the formation of a Trust enjoying the status of a qualified settlement fund, which will assume all liabilities and obligations of Fuller-Austin, among others, in respect of all Asbestos Claims, and which will provide for the equitable distribution of the Trust Assets in partial payment of all Asbestos Claims;

(b) the transfer to the Trust of 100 percent of the common stock of Fuller-Austin;

(c) the funding of the Trust with the Trust Assets;

(d) the payment of Claims in accordance with the requirements of the Bankruptcy Code; and

(e) the issuance of certain injunctions, including, but not limited to, the Discharge Injunction, the Supplemental Injunction, and the Third Party Injunction, as described below, benefitting Fuller-Austin, Reorganized Fuller-Austin and appropriate third parties. The Plan provides for the entry of Injunctions pursuant to sections 524(g) and 105(a) of the Bankruptcy Code as to Asbestos Claims. The Plan contemplates that DynCorp will be protected by the Injunctions

pursuant to sections 524(g) and 105(a) of the Bankruptcy Code; such protections will be afforded to DynCorp, in part, based on its contribution of certain valuable property to Fuller-Austin and the Trust.

The Plan provides for, among other things, a distribution of Cash on the Distribution Date to satisfy in full Allowed Administrative Claims, Allowed Priority Tax Claims, and Allowed Priority Claims, and to satisfy in part Allowed Unsecured Claims.

To address asbestos-related liability issues efficiently and fairly, the Plan provides for the establishment of a Trust, funded as set forth below, for the payment of Allowed Asbestos Claims. Asbestos Claims will be assumed by and transferred to the Trust, and will be liquidated and Allowed or disallowed in accordance with the CRP established pursuant to the Trust Agreement.

With respect to all Asbestos Claims, the goal of the Trust is fair and equitable treatment of all present claimants that have an injury, and all individuals who manifest injuries in the future, (a) from asbestos or asbestos-containing products sold, installed or removed by Fuller-Austin; (b) from services, actions, or operations provided, completed or taken by Fuller-Austin in connection with asbestos or asbestos-containing projects; or (c) for which Fuller-Austin is otherwise liable. The Trust is designed to protect those who are not presently injured but may develop an asbestos-related cancer or other asbestos-related injury in the future by retaining sufficient funds in the Trust to compensate such future Asbestos Claimants to the extent of available Trust Assets.

In addition to promptly resolving Asbestos Claims, it is anticipated that the CRP will reduce expenses significantly, which expenses would otherwise reduce assets available to holders of Asbestos Claims. All holders of Allowed Asbestos Claims will benefit from such cost savings.

The Trust will be funded with the assets to be delivered to the Trust pursuant to the DynCorp Settlement Agreement, the Plan Documents, or otherwise, and include, without limitation, the following assets and any income, profits and proceeds derived therefrom:

- Excess Cash
- $8.5 million in cash
- 100 percent of the common stock of Fuller-Austin
- by operation of law and otherwise by reason of the transfer of 100% of the common stock of Fuller-Austin, all of the Asbestos In-Place Insurance Coverage and the Asbestos Insurance Policies and all rights pursuant thereto
- the proceeds of the Asbestos Insurance Settlement Agreements
- the proceeds of the Asbestos In-Place Insurance Coverage
- the proceeds of the Asbestos Insurance Actions, subject to the terms of the DynCorp Settlement Agreement
- the proceeds of the Asbestos Insurance Action Recoveries, subject to the terms of the DynCorp Settlement Agreement.

Under financial projections (and extrapolations thereof) utilizing certain assumptions with respect to Claims estimation which Fuller-Austin believes are reasonable, and taking into account all potential sources of funding to the Trust, it is anticipated that the Trust will not be able to pay in full all Asbestos Claims as they are liquidated and will not be able to pay all Asbestos Claims in full over time. However, it can be stated with certainty that (a) Fuller-Austin has committed substantial resources for the payment of Asbestos Claims, far exceeding those resources allocated to any other creditor group under the Plan; and (b) the mechanisms of the Trust have been designed to provide reasonable assurance that the Trust will value, and will be in a financial position to pay, similar present and future Asbestos Claims in substantially the same manner. The Trust will be administered by the Trustees pursuant to the CRP. *See* Article 4 hereof for further information regarding the Trust and the CRP.

Fuller-Austin will reorganize its business operations as Reorganized Fuller-Austin. Fuller-Austin is the fee simple owner of certain income-producing real property located in Norco, California and having an appraised fair market value of approximately $1.95 million. Upon Confirmation of the Plan, this property will vest in Reorganized Fuller-Austin, subject to a nine-year lease with DynCorp for a triple net annual rental of $250,000.00.

The Plan permits the business of Reorganized Fuller-Austin to operate free of asbestos-related claims and litigation. The operating business will be protected from asbestos-related claims and litigation by Fuller-Austin's discharge and the Injunctions, which prohibit and enjoin the taking of any legal action against Fuller-Austin, Reorganized Fuller-Austin and others based upon any

claim or demand for injury or death allegedly caused by the presence of, or exposure to, asbestos or asbestos-containing products.

In addition, the Plan provides for the issuance of the Third Party Injunction to protect certain third parties, including DynCorp, which is providing Fuller-Austin with up to $300,000.00 in funding as described in Section 1.11(a) herein, and any other third parties that provide funding to Fuller-Austin or the Trust for the payment of creditors. The Injunctions are conditions precedent to, and essential elements of, the Plan.

Fuller-Austin believes that the Bankruptcy Court has the equitable jurisdiction and power under sections 105, 524 and 1141 of the Bankruptcy Code, including, but not limited to, section 524(g) of the Bankruptcy Code, to enter the Injunctions.

The distributions to each Class are summarized in the table set forth below, which table is qualified in its entirety by reference to the more detailed and complete descriptions set forth in the Plan and in this Disclosure Statement. In all instances, Fuller-Austin's estimate of the amount of Claims assumes either consensual agreements with the holders of Disputed Claims or favorable determinations as to Disputed Claims.

Summary Description of Classes and Distributions to Holders of Claims and Interests

Unclassified Claims

Description and Estimate of Claims	Description of Distributions or Treatment Under the Plan
Administrative Claims (estimated to be $300,000.00)	Each holder of an Allowed Administrative Claim (except any holder that agrees to different treatment) shall receive the Allowed Amount of its Administrative Claim, in Cash, in full satisfaction, settlement, release, extinguishment and discharge of such Claim, on the Distribution Date; provided, however, that Allowed Administrative Claims representing (a) postpetition liabilities incurred in the ordinary course of business by Fuller-Austin and (b) postpetition contractual liabilities arising under loans or advances to Fuller-Austin, whether or not incurred in the ordinary course of business, shall be paid by Reorganized Fuller-Austin in accordance with the terms and conditions of the particular transactions relating to such liabilities and any agreements relating thereto.
Priority Tax Claims (estimated to be $0)	Each holder of an Allowed Priority Tax Claim (except any holder that agrees to different treatment) shall receive the Allowed Amount of its Priority Tax Claim, in Cash, in full

satisfaction, settlement, release, extinguishment and discharge of such Claims on the Distribution Date.

Classified Claims and Interests

Description and Estimate of Claims and Interests	**Description of Distributions or Treatment Under the Plan**
Class 1 – Priority Claims (estimated to be $0)	On the Distribution Date, each holder of an Allowed Priority Claim against Fuller-Austin shall receive either (a) the Allowed Amount of its Priority Claim, in Cash or (b) such other, lesser treatment as may be agreed to in writing by such holder and Reorganized Fuller-Austin. This Class is unimpaired.
Class 2 – Secured Claims (estimated to be $0)	Each holder of an Allowed Secured Claim against Fuller-Austin shall retain, unaltered, the legal, equitable and contractual rights (including, but not limited to, any Liens that secure such Allowed Secured Claim) to which such Allowed Secured Claim entitles such holder. This Class is (or these subclasses are) unimpaired.
Class 3 – Unsecured Claims (estimated to be $0)	Except to the extent that a holder of an Allowed Class 3 Claim against Fuller-Austin has agreed to receive other, lesser treatment, on the Distribution

	Date, or as soon as practicable thereafter, each such holder shall receive a distribution from Reorganized Fuller-Austin, in Cash, equal to the Initial Payment Sum Percentage multiplied by the Allowed Amount of its Class 3 Claim. In the event that both (a) the Payment Sum Percentage is increased pursuant to Section 3.1 of the CRP within 10 years of a payment to a holder of an Allowed Class 3 Claim, and (b) the Trustees make supplemental payments to previously paid Asbestos Claimants pursuant to Section 4.3(1) of the CRP, then such Class 3 Claimant shall receive additional distributions from Reorganized Fuller-Austin, in Cash, so that each such Class 3 Claimant shall have received payments, in the aggregate, totaling the amount of the increased Payment Sum Percentage multiplied by the Allowed Amount of such Claimant's Class 3 Claim. This Class is impaired.
Class 4 – Asbestos Claims (estimated to be $286.2 million)	As of the Confirmation Date, liability for all Asbestos Claims against Fuller-Austin shall be automatically and without further act or deed assumed by the Trust. Each Asbestos Claim against Fuller-Austin shall be

	addressed by the Trust pursuant to and in accordance with the CRP. The provisions of the CRP, unless the Confirmation Order provides otherwise, shall apply to all Asbestos Claimants, including an Asbestos Claimant who elects to resort to the legal system and obtains a judgment for money damages. Unless a holder of an Asbestos Claim affirmatively elects to the contrary on the ballot provided for voting on this Plan (a) each holder of an Asbestos Claim shall be deemed to have assigned to the Trust, and (b) the Trust shall be deemed such holder's sole attorney in fact, as may be appropriate, to prosecute, at the Trust's sole discretion, any Direct Action. The Trust may, at its sole discretion, reassign such Direct Action to such holder at any time. This Class is impaired.
Class 5 – Interests in Fuller-Austin	On the Effective Date, the holder of Interests in Fuller-Austin shall retain its Interests for the limited purposes of the implementation of the DynCorp Settlement Agreement; thereafter, on the Effective Date, subject to the terms of the DynCorp Settlement Agreement, the holder shall transfer its Interests to the Trust. This Class is impaired.

FULLER-AUSTIN BELIEVES THAT IT IS IN THE BEST INTERESTS OF ALL PARTIES TO VOTE TO ACCEPT THE PLAN BECAUSE THE PLAN FAIRLY AND EQUITABLY TREATS ALL HOLDERS OF CLAIMS BY PROVIDING THE EARLIEST POSSIBLE AND MAXIMUM RECOVERY TO SUCH HOLDERS. THE COMMITTEE SUPPORTS THE PLAN AND RECOMMENDS THAT HOLDERS OF ASBESTOS CLAIMS VOTE TO ACCEPT THE PLAN.

* * *

ARTICLE 3

SUMMARY OF THE PLAN

* * *

3.2 Satisfaction of Claims and Interests.

(a) *General.* Allowed Claims and Allowed Interests, as classified in Article 2 of the Plan, shall be treated in the manner set forth in Article 3 of the Plan.

(b) *Administrative Claims and Priority Tax Claims.*

(1) *Administrative Claims.* Each holder of an Allowed Administrative Claim (except any holder that agrees to different treatment) shall receive the Allowed Amount of its Administrative Claim, in Cash, in full satisfaction, settlement, release, extinguishment and discharge of such Claim, on the Distribution Date; provided, however, that Allowed Administrative Claims representing (A) postpetition liabilities incurred in the ordinary course of business by Fuller-Austin and (B) postpetition contractual liabilities arising under loans or advances to Fuller-Austin, whether or not incurred in the ordinary course of business, shall be paid by Reorganized Fuller-Austin in accordance with the terms and conditions of the particular transactions relating to such liabilities and any agreements relating thereto.

(2) *Priority Tax Claims.* Each holder of an Allowed Priority Tax Claim (except any holder that agrees to different treatment) shall receive the Allowed Amount of its Priority Tax Claim, in Cash, in full satisfaction, settlement, release, extinguishment and discharge of such Claim on the Distribution Date.

(c) *Fuller-Austin Claims and Interests.* The following constitutes the treatment under the Plan of the Fuller-Austin Allowed Claims and Allowed Interests:

(1) *Class 1 – Priority Claims.* On the Distribution Date, each holder of an Allowed Priority Claim against Fuller-Austin shall receive either (A) the Allowed Amount of its Priority Claim, in Cash, or (B) such other, lesser treatment as may be agreed to in writing by such holder and Reorganized Fuller-Austin.

(2) *Class 2 – Secured Claims.* Each holder of an Allowed Secured Claim against Fuller-Austin shall retain, unaltered, the legal, equitable and contractual rights (including, but not limited to, any Liens that secure such Allowed Secured Claim) to which such Allowed Secured Claim entitles such holder.

(3) *Class 3 – Unsecured Claims.* Except to the extent that a holder of an Allowed Class 3 Claim against Fuller-Austin has agreed to receive other, lesser treatment, on the Distribution Date, or as soon as practicable thereafter, each such holder shall receive a distribution from Reorganized Fuller-Austin, in Cash, equal to the Initial Payment Sum Percentage multiplied by the Allowed Amount of its Class 3 Claim. In the event that both (A) the Payment Sum Percentage is increased pursuant to Section 3.1 of the CRP within 10 years of a payment to a holder of an Allowed Class 3 Claim, and (B) the Trustees make supplemental payments to previously paid Asbestos

Claimants pursuant to Section 4.3(1) of the CRP, then such Class 3 Claimant shall receive additional distributions from Reorganized Fuller-Austin, in Cash, so that each such Class 3 Claimant shall have received payments, in the aggregate, totaling the amount of the increased Payment Sum Percentage multiplied by the Allowed Amount of such Claimant's Class 3 Claim.

(4) *Class 4 – Asbestos Claims.* As of the Confirmation Date, liability for all Asbestos Claims against Fuller-Austin shall be automatically and without further act or deed assumed by the Trust. Each Asbestos Claim against Fuller-Austin shall be addressed by the Trust pursuant to and in accordance with the CRP. The provisions of the CRP, unless the Confirmation Order provides otherwise, shall apply to all Asbestos Claimants, including an Asbestos Claimant who elects to resort to the legal system and obtains a judgment for money damages. Unless a holder of an Asbestos Claim affirmatively elects to the contrary on the ballot provided for voting on this Plan (A) each holder of an Asbestos Claim shall be deemed to have assigned to the Trust, and (B) the Trust shall be deemed such holder's sole attorney in fact, as may be appropriate, to prosecute at the Trust's sole discretion, any Direct Action. The Trust may, at its sole discretion, reassign such Direct Action to such holder at any time.

(5) *Class 5 – Interests.* On the Effective Date, the holder of Interests in Fuller-Austin shall retain its Interests for the limited purposes of the implementation of the DynCorp Settlement Agreement; thereafter, on the Effective Date, subject to the terms of the DynCorp Settlement Agreement, the holder shall transfer its Interests to the Trust.

* * *

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
FULLER-AUSTIN INSULATION COMPANY,	)	Case No. 98-2038
Debtor.	)	

PLAN OF REORGANIZATION UNDER CHAPTER 11 OF THE UNITED STATES BANKRUPTCY CODE FOR FULLER-AUSTIN INSULATION COMPANY

YOUNG CONAWAY STARGATT & TAYLOR, LLP
James L. Patton, Jr. (No. 2202)
Laura Davis Jones (No. 2436)
Joel A. Waite (No 2925)
Matthew G. Zaleski, III (No. 3557)
11th Floor, Rodney Square North
P.O. Box 391
Wilmington, Delaware 19899-0391
(302) 571-6670

Counsel for the Debtor

Dated: June 26, 1998

* * *

ARTICLE 3

TREATMENT OF CLAIMS AND INTERESTS

* * *

3.2 Classes of Claims and Interests.

* * *

(4) *Class 4 – Asbestos Claims.* As of the Confirmation Date, liability for all Asbestos Claims against Fuller-Austin shall be automatically and without further

act or deed assumed by the Trust. Each Asbestos Claim against Fuller-Austin shall be addressed by the Trust pursuant to and in accordance with the CRP. The provisions of the CRP, unless the Confirmation Order provides otherwise, shall apply to all Asbestos Claimants, including an Asbestos Claimant who elects to resort to the legal system and obtains a judgment for money damages. Unless a holder of an Asbestos Claim affirmatively elects to the contrary on the ballot provided for voting on this Plan, (i) each holder of an Asbestos Claim shall be deemed to have assigned to the Trust, and (ii) the Trust shall be deemed such holder's sole attorney in fact, as may be appropriate, to prosecute at the Trust's sole discretion, any Direct Action The Trust may, at its sole discretion, reassign such Direct Action to such holder at any time. This Class is impaired.

* * *

ARTICLE 4

THE TRUST

4.1 *Establishment And Purpose Of Trust.* On the Effective Date, the Trust shall be established in accordance with the Plan Documents. The Trust shall be a "qualified settlement fund" within the meaning of section 468B of the IRC and the regulations issued pursuant thereto. The purpose of the Trust shall be to, among other things, (a) direct the liquidation, resolution, payment, and satisfaction of all Asbestos Claims in accordance with the Plan, the CRP, and the Confirmation Order; (b) preserve, hold, manage, and maximize the Trust Assets for use in paying and satisfying Allowed Asbestos Claims; (c) prosecute, settle, and manage the disposition of the Asbestos In-Place Insurance Coverage; and (d) prosecute, settle, and manage Asbestos Insurance Actions The CRP shall provide

for the allowance and payment or disallowance of Asbestos Claims pursuant to the terms of the Plan Documents.

4.2 *Receipt Of Trust Assets.* On the Effective Date, all Trust Assets shall be transferred to, vested in, and assumed by the Trust, subject to the terms of the DynCorp Settlement Agreement; provided, however, that to the extent that certain Trust Assets, because of their nature or because they will accrue subsequent to the Effective Date, cannot be transferred to, vested in, and assumed by the Trust on the Effective Date, such Trust Assets shall be transferred to, vested in, and assumed by the Trust as soon as practicable after the Effective Date.

4.3 *Discharge Of Liabilities To Holders Of Asbestos Claims.* Except as provided in the Plan Documents and Confirmation Order, the transfer to, vesting in, and assumption by the Trust of the Trust Assets as contemplated by the Plan, among other things, shall (1) discharge the Debtor and Reorganized Fuller-Austin for and in respect of all Asbestos Claims and (2) discharge, release, and extinguish all obligations and liabilities of the Released Non-Debtor Parties and their respective Estates, Affiliates, and subsidiaries, for and in respect of all Asbestos Claims. The Trust shall assume responsibility and liability for all Asbestos Claims and the Trust shall be responsible and liable for all obligations owed by the Trust under the DynCorp Settlement Agreement or the DynCorp Release and such Claims shall be paid by the Trust in full.

4.4 *Excess Trust Assets.* To the extent there are any Trust Assets remaining after the payment, in full, of all Allowed Asbestos Claims and the payment, in full, of all Trust Expenses, such excess Trust Assets shall be transferred, in accordance with Article 7.2(b) of the Trust

Agreement, to such charitable purposes as the Trustees, in their reasonable discretion, shall determine; provided, however, that such charitable purposes, if practicable, shall be related to the treatment of, research regarding or payment of claims related to asbestos-caused disorders.

4.5 *Trust Expenses.* The Trust shall pay all Trust Expenses from the Trust Assets. Neither the Debtor, Reorganized Fuller-Austin, nor DynCorp shall have any obligation to pay any Trust Expenses.

* * *

CLAIMS RESOLUTION PROCEDURES

These Asbestos Claims Resolution Procedures have been adopted in connection with the Plan of Reorganization Under Chapter 11 of the United States Bankruptcy Code for Fuller-Austin Insulation Company filed in the reorganization case of Fuller-Austin pending in the United States Bankruptcy Court for the District of Delaware and styled *In re Fuller-Austin Insulation Company*. Case No. _____, as such plan may be amended, modified, of supplemented from time to time.

The CRP provide for processing, liquidating, deeming Allowed or not Allowed, paying, and satisfying all Asbestos Claims as provided in and required by the Plan and the Trust Agreement The Trustees shall implement and administer the CRP in accordance with the Trust Agreement. Capitalized terms used herein shall have the meanings assigned to them in the Glossary of Terms for the Plan Documents Pursuant to the Plan of Reorganization under Chapter 11 of the United States Bankruptcy Code for Fuller-Austin Insulation Company, attached as Exhibit 1 to the Plan, and such definitions are incorporated herein

by reference. All capitalized terms not defined herein or in the Glossary, but defined in the Bankruptcy Code or Rules shall have the meanings ascribed to them by the Bankruptcy Code or Rules, and such definitions are incorporated herein by reference.

SECTION I

Purpose and Interpretation

1.1 ***Submission Of All Claims.*** All Asbestos Claims and Demands shall be submitted to the Trust in accordance with the CRP, and the CRP shall constitute the sole and exclusive method by which the holder of an Asbestos Claim or Demand against the Trust, Fuller-Austin. Reorganized Fuller Austin, any Protected Party, any Released Party or any Asbestos Insurance Company may pursue such Asbestos Claim or Demand The Trustees shall not liquidate or pay Asbestos Claims or Demands except in accordance with the CRP. Notwithstanding the foregoing, the Trust may elect to prosecute before the Bankruptcy Court (and all appellate courts) to a Final Order objections to Asbestos Claims filed prior to the Effective Date. Between Confirmation and the Effective Date, prosecution of objections to Asbestos Claims filed-between Confirmation and the Effective Date shall be stayed. Upon allowance of any part of such Asbestos Claim by a Final Order or settlement, the claimant will be paid in accordance with CRP. Additionally, and notwithstanding anything in the CRP to the contrary, the Trust shall pay, or direct Reorganized Fuller-Austin to pay as may be appropriate, to holders of Asbestos Claims the sums required to be paid pursuant to settlements and agreements under Article 5 3 of the Plan without application of the Payment Sum Percentage.

1.2 ***Purpose*** The CRP are adopted pursuant to the Trust Agreement. They are designed to provide prompt determination and payment of Allowed Asbestos Claims and provide reasonable assurance that the Trust will value and be in a financial position to pay similar Asbestos Claims and Demands in substantially the same manner: provided that nothing in the CRP shall apply to a claim for indemnification by an Additional Indemnitee, or by a Released DynCorp Party on account of a Fuller Indemnified Claim, against the Trust, including, without limitation, the processing, determination, allowance, or payment of such claim.

1.3 ***Interpretation.*** Nothing in the CRP shall be deemed to create a substantive right for any claimant. The CRP are procedural and may be amended, deleted, or added to pursuant to the terms of the Plan, the Trust Agreement, the CRP, and the Confirmation Order

1.4 ***General Principles.*** The best information available at the time of the filing of the Reorganization Case indicates that there are not sufficient assets in the Debtor's Estate to pay the full and fair value of all Asbestos Claims. Thus, the formation of the Trust is premised upon the overarching goal of the Reorganization Case – maximizing the value of the amount paid to each holder of an Allowed Asbestos Claim Simultaneously, the Trustees must act in a manner designed to provide substantially the same treatment to each holder of an Asbestos Claim or Demand. In order to aid the Trustees, the following general principles shall guide their decisions and actions.

(a) The Trustees shall favor negotiated or mediated settlement over arbitration or other form of binding alternative dispute resolution, arbitration or other

form of binding alternative dispute resolution over resort to the tort system, and fair and efficient resolution of Claims in all cases, while endeavoring to preserve and enhance the Trust Assets.

(b) The Trustees shall employ mechanisms such as the review of estimates of the numbers and values of Asbestos Claims, or other comparable mechanisms, that provide reasonable assurance the Trust will value, and be in a financial position to pay, present Asbestos Claims and future Demands that involve similar claims in substantially the same manner.

(c) There is inherent uncertainty, regarding Fuller-Austin's total liabilities to holders of Asbestos Claims as well as the total value of the Trust Assets available to pay Allowed Asbestos Claims. Consequently, there is inherent uncertainty as to whether similar amounts can be paid in respect of all similar present and future Allowed Asbestos Claims. Accordingly, subject to the terms of Section II of the CRP, the Trustees have the power to alter the Payment Sum Percentage, the timing, method and sequencing of payments to holders of Allowed Asbestos Claims, the Asbestos-Related Disease Categories and the Criteria, as well as the power to increase the Allowed Liquidated Value for any Asbestos-Related Disease Category. In order to exercise these powers, the Trustees will need to make determinations and predictions about the amount and timing of the receipt of Trust Assets, as well as determinations and predictions about the amount and timing of payment, and cost of processing. Asbestos Claims. The determination of the Payment Sum Percentage shall be based, on the one hand, upon estimates of the number, types, and amounts of present and expected future Asbestos Claims and, on the other hand,

on the value of the Trust Assets, the liquidity of those assets, the Trust's expected future expenses and income, as well as other material matters that are reasonable and likely to affect the sufficiency of funds to pay a comparable percentage of full value to all holders of Asbestos Claims When making these determinations, the Trustees shall recognize that both present and future claimants bear a risk that the determinations will be incorrect, either too low or too high. In making determinations, the Trustees shall not prefer either present or future claimants by giving either group greater protection from such risks Rather, the Trustees shall make determinations based on their best estimates of total Trust Assets, Asbestos Claims and related matters The Trustees will properly discharge their duties in this regard, and be protected from liability, by making reasonable determinations based on the best information available to them from time to time.

* * *

SECOND AMENDED
CLAIMS RESOLUTION PROCEDURES

These Asbestos Claims Resolution Procedures have been adopted in connection with the Plan of Reorganization Under Chapter 11 of the United States Bankruptcy Code for Fuller-Austin Insulation Company filed in the reorganization case of Fuller-Austin pending in the United States Bankruptcy Court for the District of Delaware and styled *In re Fuller-Austin Insulation Company,* Case No. 98-2038(JJF), as such plan may be amended, modified, or supplemented from time to time.

The CRP provide for processing, liquidating, deeming Allowed or not Allowed, paying, and satisfying all Asbestos Claims as provided in and required by the Plan and the Trust Agreement. The Trustees shall Implement and administer the CRP in accordance with the Trust Agreement. Capitalized terms used herein shall have the meanings assigned to them in the Glossary of Terms for the Plan Documents Pursuant to the Plan of Reorganization under Chapter 11 of the United States Bankruptcy Code for Fuller-Austin Insulation Company, attached as Exhibit 1 to the Plan, and such definitions are incorporated herein by reference. All capitalized terms not defined herein or in the Glossary, but defined in the Bankruptcy Code or Rules shall have the meanings ascribed to them by the Bankruptcy Code or Rules, and such definitions are incorporated herein by reference.

SECTION I

Purpose and Interpretation

1.1 Submission Of All Claims. All Asbestos Claims and Demands shall be submitted to the Trust in accordance

with the CRP, and the CRP shall constitute the sole and exclusive method by which the holder of an Asbestos Claim or Demand against the Trust, Fuller-Austin, Reorganized Fuller Austin, any Protected Party, any Released Party or any Asbestos Insurance Company may pursue such Asbestos Claim or Demand. The Trustees shall not liquidate or pay Asbestos Claims or Demands except in accordance with the CRP. Notwithstanding the foregoing, the Trust may elect to prosecute before the Bankruptcy Code (and all appellate courts) to a Final Order objections to Asbestos Claims filed prior to the Effective Date. Between Confirmation and the Effective Date, prosecution of objections to Asbestos Claims filed between Confirmation and the Effective Date shall be stayed. Upon allowance of any part of such Asbestos Claim by a Final Order or settlement the claimant will be paid in accordance with CRP. Additionally, and notwithstanding anything in the CRP to the contrary, the Trust shall pay, or direct Reorganized Fuller-Austin to pay as may be appropriate, to holders of Asbestos Claims the sums required to be paid pursuant to settlements and agreements under Article 5.3 of the Plan without application of the Payment Sum Percentage.

1.2 Purpose. The CRP are adopted pursuant to the Trust Agreement. They are designed to provide prompt determination and payment of Allowed Asbestos Claims and provide reasonable assurance that the Trust will value and be in a financial position to pay similar Asbestos Claims and Demands in substantially the same manner; provided that nothing in the CRP shall apply to a claim for indemnification by an Additional Indemnitee, or by a Released DynCorp Party on account of a Fuller Indemnified Claim, against the Trust, including, without limitation, the

processing, determination, allowance, or payment of such claim.

1.3 Interpretation. Nothing in the CRP shall be deemed to create a substantive right for any claimant. The CRP are procedural and may be amended, deleted, or added to pursuant to the terms of the Plan, the Trust Agreement, the CRP, and the Confirmation Order.

1.4 General Principles. The best information available at the time of the filing of the Reorganization Case indicates that there are not sufficient assets in the Debtor's Estate to pay the full and fair value of all Asbestos Claims. Thus, the formation of the Trust is premised upon the overarching goal of the Reorganization Case maximizing the value of the amount paid to each holder of an Allowed Asbestos Claim. Simultaneously, the Trustees must act in a manner designed to provide substantially the same treatment to each holder of an Asbestos Claim or Demand. In order to aid the Trustees, the following general principles shall guide their decisions and actions.

(a) The Trustees shall favor negotiated or mediated settlement over arbitration or other form of binding alternative dispute resolution, arbitration or other form of binding alternative dispute resolution over resort to the tort system, and fair and efficient resolution of Claims in all cases, while endeavoring to preserve and enhance the Trust Assets.

(b) The Trustees shall employ mechanisms such as the review of estimates of the numbers and values of Asbestos Claims, or other comparable mechanisms, that provide reasonable assurance the Trust will value, and be in a financial position to pay, present Asbestos Claims and

future Demands that involve similar claims in substantially the same manner.

(c) There is inherent uncertainty regarding Fuller-Austin's total liabilities to holders of Asbestos Claims as well as the total value of the Trust Assets available to pay Allowed Asbestos Claims. Consequently, there is inherent uncertainty as to whether similar amounts can be paid in respect of all similar present and future Allowed Asbestos Claims. Accordingly, subject to the terms of Section II of the CRP, the Trustees have the power to alter the Payment Sum Percentage, the timing, method, and sequencing of payments to holders of Allowed Asbestos Claims, the Asbestos-Related Disease Categories and the Criteria, as well as the power to increase the Allowed Liquidated Value for any Asbestos-Related Disease Category. In order to exercise these powers, the Trustees will need to make determinations and predictions about the amount and timing of the receipt of Trust Assets, as well as determinations and predictions about the amount and timing of payment, and cost of processing, Asbestos Claims. The determination of the Payment Sum Percentage shall be based, on the one hand, upon estimates of the number, types, and amounts of present and expected future Asbestos Claims and, on the other hand, on the value of the Trust Assets, the liquidity of those assets, the Trust's expected future expenses and income, as well as other material matters that are reasonable and likely to affect the sufficiency of funds to pay a comparable percentage of full value to all holders of Asbestos Claims. When making these determinations, the Trustees shall recognize that both present and future claimants bear a risk that the determinations will be incorrect, either too low or too high. In making determinations, the Trustees

shall not prefer either present or future claimants by giving either group greater protection from such risks. Rather, the Trustees shall make determinations based on their best estimates of total Trust Assets, Asbestos Claims and related matters. The Trustees will properly discharge their duties in this regard, and be protected from liability, by making reasonable determinations based on the best information available to them from time to time.

(d) All Asbestos Claims are subject to applicable statutes of limitation and to those matters which tolled applicable statutes of limitation under applicable state law at any time prior to the Petition Date. Applicable statutes of limitation with respect to Asbestos Claims are tolled as of the Petition Date and will recommence as to each claimant on the date such claimant is required to file Claims Materials under Section 5.4. If a claimant timely files Claims Materials with the Trust, applicable statutes of limitation as to such claimant's Asbestos Claim shall be tolled from the date of filing of such Claims Materials until one hundred eighty (180) days after notice of the allowance or disallowance of the Asbestos Claim has been mailed or transmitted to the claimant; provided, however, that if a claimant timely seeks review available pursuant to the CRP, applicable statutes of limitation as to such claimant's Asbestos Claim shall be tolled until ninety (90) days after the entry of a non-binding arbitration award.

(e) If, during the evaluation of a Claim by the Trust, the Trust determines that the Claim fails to meet the criteria of the CRP for allowance or that the submitted claim form or supporting materials are deficient, the Trust will provide the claimant with a written deficiency notice. The claimant shall have ninety (90) days from the mailing of the deficiency notice by the Trust to cure the noted

deficiencies by providing the requested information or materials. The claimant may request an extension of sixty (60) days from the end of the 90-day period to cure the deficiency. Such request must be in writing and must be received by the Trust not later than the end of the 60-day period. If the claimant fails to cure the deficiency within such 90-day period or a requested 60-day extension period, the claim automatically will be deemed rejected, without further notice. The Trust may, but will have no obligation to, provide additional deficiency notices with respect to any deficiency, if the claimant attempts to cure the deficiency and the attempted cure is inadequate. After such additional notice, if any, the claimant will have sixty (60) days to respond, with no provision for additional extension.

* * *

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE UNR INDUSTRIES, INC., UNARCO INDUSTRIES, INC., UNR, INC., UNR-JOHN, INC., (Alabama), UNR-ROHN, INC. (Indiana), JOBAL TUBE CO., INC., UNR PRODUCTS, INC., and FOLDING CARRIER CORP., Debtors	In Proceedings for a Reorganization Under Chapter 11 of the Bankruptcy Code Nos. 82 B 9841-9845, 82 B 9847 82 B 9849 and 82 B 9851

ORDER APPROVING DISCLOSURE STATEMENT AND FIXING TIME FOR FILING ACCEPTANCES OR REJECTIONS OF PLAN, COMBINED WITH NOTICE THEREOF

DISCLOSURE STATEMENT
Dated March 14, 1989

PLAN OF REORGANIZATION
Dated March 14, 1989

and

RELATED DOCUMENTS

* * *

PROPOSED
CLAIMS RESOLUTION
PROCEDURES

EXHIBIT F-1

Professor Francis McGovern's Proposed Claims Resolution Procedures

A. Introduction

The best available information from the discovery in the UNR Industries, Inc. ("UNR") bankruptcy proceeding indicates that there will be in excess of 60,000 claims made against the UNR Asbestos Disease Claims Trust ("Trust") Current estimates of the total value of UNR suggest that this case is a traditional bankruptcy; there simply is not sufficient money available to pay full and fair value for each UNR Asbestos Disease Claim. In this respect, the UNR situation is substantially different from the Manville bankruptcy and, therefore, warrants different treatment.

Bankruptcy law requires that the members of each class of claimants be treated equivalently. If there is not sufficient money to pay full value for all of the claims in a class, then all class claimants must be paid the same percentage of full value in accordance with available funds if, for example, there are funds sufficient to pay 25 percent of the total value of all claims, then each claimant should be paid 25 percent of the total value of his respective claim.

The claims covered by these UNR Asbestos Disease Claims Resolution Procedures ("Procedures") are "Asbestos Disease Claims." These claims have been defined in the Consolidated Plan of Reorganization of UNR and its affiliates (the "Plan")[1] – as:

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[1] Please see the Plan, page two, for the most current definition of Asbestos-Disease Claims

> All alleged liabilities or obligations (under any theory of law, equity or admiralty) for death, personal injury, personal damages or punitive damages (whether physical, emotional or otherwise), whether or not included in the definition of "claim" in § 101(4) of the Code, arising out of exposure to asbestos and arising from acts or omissions, prior to the Effective Date, by one or more of the Debtors or the Debtors' predecessor in interest, regardless of when the sickness, injury or disease which gives rise to such liability or obligation, becomes or will become manifest, including, without limitation, all warranty, guarantee, indemnification or contribution liabilities or obligations of any of the Debtors to any other Entity to the extent that such warranties, guarantees, indemnifications or contribution responsibilities to such Entity cover claims against such Entity that would, if such claims had been made directly against any of the Debtors, constitute Asbestos Disease Claims.

Under the Procedures, each member of the Asbestos Disease Claims class must be treated equivalently in accordance with a series of claims resolution options. Claimants may choose among three different options for the liquidation and settlement of their claims: (1) an expeditious, but limited immediate flat payment, (2) immediate partial payment plus payment over time as money becomes available to the Trust or (3) a deferred claim. All claims will be subject to careful scrutiny to ensure that the only claims paid are valid asbestos injury claims caused by exposure to UNR asbestos-containing products. Values for the claims will be based upon values established in the tort system considering all relevant factors.

One very significant feature of the procedures is that a claimant's right to a jury trial shall be maintained

Payments will be made from the Trust in a first-in-first-out order as explained in the Guidelines set forth hereafter in Section H. The Trustees shall participate and consult with a Trustees' Advisory Committee ("TAC") composed of representatives of claimants in making all major policy and administrative decisions concerning the operation of the Trust and the implementation of these Procedures. A detailed explanation of the operation of some of these Procedures prepared in consultation with the UNR Creditor's Committee of Asbestos-Related Plaintiffs and the Legal Representative for Unknown Asbestos-Related Claimants is available from the Committee.

B. Purpose

The purpose of the Procedures is to provide fair payment to all persons with valid Asbestos Disease Claims for personal injuries resulting from exposure to UNR asbestos-containing products, taking into account the basic principles of the tort system and the resources available to the Trust. It seems clear, based on the information presently available, that there will be insufficient funds available to make full and fair payments to all claimants for the injury and damages from exposure to UNR asbestos-containing products. Consistent with this reality, the nature of asbestos-related disease, and the inherent characteristics of the related litigation, the Trust shall treat similar and common cases with similar circumstances and factors alike. The Trust shall make payments to valid claimants as funds become available and as claims are liquidated while maintaining sufficient resources to

pay all valid Asbestos Disease Claims, including future claims, on a substantially equal basis. Settlements shall be favored over all other forms of claim resolution, and the lowest feasible transaction costs shall be incurred in order to conserve resources and ensure, as much as possible, substantially equal payment for all valid claims The Guidelines in Section H. are intended to provide additional general implementation instructions for the Trustees.

* * *

H. Guidelines

1. *Application*

These guidelines shall apply to all options.

2. *Order of Consideration*

In determining eligibility for consideration, claims will be processed on a first-in-first-out basis in order of the date of the earliest filing of the claim (i) if before July 29, 1982, in a court against UNR; (ii) if after duly 29, 1982, but before the confirmation of the Plan, in a court against any asbestos producer, regardless of whether UNR was named as a party co-defendant in such initial filing, or (iii) if after the confirmation of the Plan, against the Trust. In the event that a claim against UNR as the only defendant could not have been filed because of the UNR Chapter 11 proceeding, the claim shall be processed based upon the date of initial diagnosis of an asbestos-related disease. The Trust may make group settlements, but payments called for by group settlements shall be made so they do not materially alter the first-in-first-out rule of priority. Claims involving extreme and undue hardship not experienced by other

claimants may be considered separately.In the event that the Trustees determine it advisable primarily, but not exclusively, in order to reduce transaction costs, they may suspend their normal order of consideration in favor of claimants who select Option 1.

3. *Payments*

The amount, time, and manner of payments to be made by the Trust shall be determined by the Trustees in accordance with the principles contained in Section B. To the extent feasible, Option 1 payments shall be made in cash by check; Option 2 payments shall be in cash by check and payments over time; and Option 3 payments shall be in cash by check and/or payments over time.

As determined by the Trustees based upon the availability of funds and other considerations, payments made over time shall be paid in a manner designed to ensure that all claims are paid substantially equally. For example, the Trustees may make annual analyses in order to determine the availability of current funds and the future requirements for funds. The Trustees may then utilize available cash to make annual payments of a percentage of all outstanding monies owed over time consistent with the demands of equal treatment of all claimants. In addition, the Trustees may withhold some portion of the amounts awarded for claims under Option 2 or 3 and pay the balance withheld at such time and in such amounts as necessary to enhance equality in distribution and payment among all claimants.

4. *Monitoring*

The Trustees may conduct random or other audits to verify information submitted in connection with any option or step in any option in the claims resolution procedures. To the extent practicable, the Trust shall utilize the panels described in Section H.5 for this purpose in the event that an audit reveals that invalid information has been provided to the Trust, the Trustees may penalize any claimant or claimant's attorney by seeking sanctions from the US. District Court in which the bankruptcy was filed including, but not limited to, requiring the offending source to pay the costs associated with the audit and any future audit or audits, reordering the priority of payment of claims, raising the level of scrutiny of additional information submitted from the same source or sources, or prosecuting the claimant or claimant's attorney for presenting a fraudulent claim in violation of Title 18, U.S.C. § 152.

5. *Pro Bono Plaintiff Attorney and Neutral Panels*

The Trust shall seek to establish panels of *pro bona* plaintiffs' attorneys and/or other neutral persons to provide an appropriate methodology for verification and evaluation of claims. This verification and evaluation shall be conducted by plaintiffs' attorneys and/or neutrals on issues requested by the Trust or the claimants. *Pro bono* plaintiffs' attorney panels may be used only with the consent of the claimant or claimant's attorney and shall be done anonymously so that neither the identification of the claimant, nor the claimant's attorney, nor the *pro bono* evaluator is known to the other. Notwithstanding anything to the contrary, the claimant's attorney and the *pro bono* evaluator may waive the requirement of anonymity.

6. *Alternative Dispute Resolution*

The Trustees shall establish an appropriate alternative dispute resolution process so that the claimants and the Trust shall have a full range of alternative dispute resolution devices available for their use including, but not limited to, mediation, facilitation, and arbitration. Members of the Section H.5 panels may also be used for any form of alternative dispute resolution. If compensation of an alternative dispute resolution provider becomes necessary, each side shall bear its own costs.

7. *Forms and Procedures*

The Trustees shall draft appropriate forms and instructions for all Asbestos Disease Claims under Options 1-3. All forms shall indicate that they are submitted to the Trust with a declaration of their accuracy under penalty for presentation of a fraudulent claim in accordance with Title 18, U.S.C. § 152. The Trustees shall develop and implement procedures and processes under each option in accordance with the principles outlined in Section B.

8. *Release*

As a condition to making any payment to a claimant, the Trust shall obtain a general or partial or limited release as appropriate in accordance with the applicable state or other law and consistent with the Option selection by the claimant. If allowed by state law, the endorsing of a check or draft for payment by or on behalf of a claimant shall constitute such a release.

9. *Time Frames*

Time frames for the performance of the various duties of the Trust shall be determined by the Trustees consistent with the purpose of these Procedures as contained in Section B.

10. *Alternative Claim Resolution Options*

The Trustees may, based upon new circumstances or developments, design alternative options to these Procedures as long as they are consistent with the purposes contained in Section B.

11. *Trustees' Advisory Committee*

There shall be a Trustees' Advisory Committee ("TAC") composed of five persons jointly selected by the UNR Creditors' Committee of Asbestos-Related Plaintiffs and the Legal Representative for Putative Asbestos-Related Claimants. The Trustees shall consult with the TAC on all critical issues facing the Trust including, but not limited to, implementation of procedures under Options 1, 2, and 3; development of FIFO-rules; payments; monitoring; attorney and neutral panels; ADR; forms and procedures; releases; time frames, cooperation with other claims resolution organization; and alternative options under these procedures.

EXHIBIT F-2

Plaintiffs' Committee's and Legal Representative's Proposed Trust Agreement and Annexes Thereto

This Trust Agreement is among UNR Industries, Inc., Unarco Industries, Inc., UNR, Inc., UNR-Rohn, Inc.

(Alabama), UNR-Rohn, Inc. (Indiana), Jobal Tube Co., Inc., UNR Products, Inc. and Folding Carrier Corp (sometimes referred to collectively as "Debtors"), as Settlers, and ___, the Trustees pursuant to the ___ Amended and Restated Consolidated Plan of Reorganization of the Debtors dated ___, 1989 (the "Plan").

WHEREAS, the Debtors are seeking to reorganize under the provisions of Chapter 11 of the United States Bankruptcy Code (the "Code"); and

WHEREAS, the Debtors have filed the Plan, which provides, among other things, for the discharge of any liability the Debtors may have for debts to persons holding Asbestos-Disease Claims; and

WHEREAS, the Plan contemplates the creation of a trust, the assets of which will be used to resolve and satisfy all Asbestos-Disease Claims asserted against the Debtors.

NOW, THEREFORE, it is hereby agreed as follows:

Article I

DEFINITIONS

Unless the context requires otherwise, all capitalized terms used herein and not otherwise defined shall have the meanings assigned to them by the Plan and/or the Code, which are incorporated by reference herein.

Article II

AGREEMENT OF TRUST

2.01 *Creation and Name.* There is hereby created a trust, which shall be known as the "UNR Asbestos-Disease Claims Trust" (the "Trust").

2.02 *Purpose.* The purpose of the Trust is to assume any and all liabilities of the Debtors, their successors in interest or their affiliates with respect to persons holding *bona fide* Asbestos-Disease Claims by fully, fairly and expeditiously compensating such claimants pursuant to the provisions of the Trust and the UNR Asbestos-Disease Claims Resolution Procedures ("Procedures"). In furtherance of this purpose, the Trustees shall be responsible for supervising and administering the claims resolution process set forth in the Procedures, a copy of which is appended hereto as Annex B.

2.03 *Transfer of Assets.* There is hereby transferred and assigned to the Trust 29,437,004 shares of the common stock of New UNR (the "Shares"), and $1,000,000 in cash, representing a loan to the Trust from New UNR secured by the Shares and the proceeds of which shall be utilized to begin immediate implementation of the Procedures

2.04 *Acceptance of Assets and Assumption of Liabilities.* In connection with and in furtherance of the purposes of the Trust, and subject to Section 5.04, the Trustees hereby expressly accept the transfer and assignment to the Trust of the assets described in Section 2.03, and the Trust hereby further expressly assumes, undertakes and shall control the liquidation of all Asbestos-Disease Claims. Notwithstanding the foregoing, the Trust shall not have any obligation with respect to any warranty,

guarantee, contribution or indemnification liability constituting an Asbestos-Disease Claim unless the same has been liquidated prior to the consummation date. Moreover, the Trustees shall not pay any such liquidated warranty, guarantee, contribution or indemnification claim unless and until the aggregate liability of the Trust in respect of the Asbestos-Disease Claim underlying such liability or obligation, whether directly or through contribution, also has been liquidated. Holders of such liquidated warranty, guarantee, contribution or indemnification claim shall receive payment in an amount to be determined by the Trustees to be substantially equal in proportion to that received by holders of Asbestos-Disease Claims. Neither the Debtors nor New UNR shall be entitled to any indemnification from the Trust for any expenses, costs and fees (including attorneys' fees), judgment, settlements, or other liabilities arising from or incurred in connection with, any action related to an Asbestos-Disease Claim.

Article III

POWERS, TRUST ADMINISTRATION

3.01 *Powers* (a) Subject to the limitations set forth in this Trust Agreement, the Trustees shall have the power to take any and all such actions as in the judgment of the Trustees are necessary or convenient to effectuate the purposes of the Trust, including, without limitation, each power expressly granted in Subsection 3.01(c), any power reasonably incidental thereto, and any trust power now or hereafter permitted under the law of the State of Illinois (including the Illinois Trust and Trustees Act) that is not inconsistent with the provisions of this Trust.

(b) Except as provided in the Plan or otherwise specified herein, the Trustees need not obtain the order of approval of any court in the exercise of any power or discretion conferred hereunder, or account to any court in the absence of a breach of trust.

(c) Without limiting the generality of Subsection 3.01(a), above, the Trustees shall have the power to:

(i) receive and hold the Trust estate, and invest in cash, bonds, stocks, securities, certificates of deposit, and other cash equivalents from time to time therein, subject to the limitations set forth in Section 4.02;

(ii) supervise and administer the Procedures;

(iii) pay liabilities and expenses of the Asbestos-Disease Claims in accordance with the Procedures as applicable, or as otherwise allowed;

(iv) borrow money and issue notes and Other evidence of indebtedness (which notes or other evidence of indebtedness may exonerate the Trustees from personal liability with respect thereto) in the ordinary course of operations for payment of *bona fide* Asbestos-Disease Claims and other expenses and liabilities of the Trust;

(v) exercise all rights and benefits accruing to the Trust as owner of the Shares;

(vi) establish such funds, reserves and accounts within the Trust estate, as deemed by the Trustees to be useful in carrying out the purposes of the Trust;

(vii) sue and be sued and participate, as a party or otherwise, in any judicial, administrative, arbitrative or other proceeding, including, without limitation, in connection with the Procedures;

(viii) amend the Bylaws;

(ix) appoint such officers and hire such employees and engage such legal, financial, accounting, investment and other advisors, custodians of assets, alternative dispute resolution panelists, and agents as the business of the Trust requires, and to delegate to such persons such powers, authorities and discretions as the Trustees, in their discretion, deem advisable or necessary in order to carry out the terms of this Trust;

(x) pay the Trustees, subject to Section 5.05, and pay such officers, employees, legal, financial, accounting, investment and other advisors, agents and alternative dispute resolution panelists reasonable compensation;

(xi) reimburse the Trustees, subject to Section 5 05, and reimburse such officers, employees, legal, financial, accounting, investment and other advisors, agents, alternative dispute resolution panelists and members of the Trustees' Advisory Committee ("TAC") for all properly documented out-of-pocket costs and expenses incurred by such persons in connection with the performance of their duties hereunder;

(xii) enter into such other arrangements with third parties as are deemed by the Trustees to be useful in carrying out the purposes of the Trust,

(possibly including, without limitation, engaging a Person having trust powers to act as paying agent, depository, custodian, or trustee with respect to funds, reserves or accounts created hereby or established pursuant hereto);

(xiii) in accordance with Section 5.06, indemnify (and purchase insurance indemnifying) Trustees and officers, employees, agents and representatives of the Trust to the fullest extent that a corporation organized under Illinois law is from time to time entitled to indemnify its directors, officers, employees, agents and representatives;

(xiv) indemnify (and purchase insurance indemnifying) the Additional Indemnitees as defined in Section 5.06 hereof;

(xv) enter into any contract or otherwise engage in any transaction with any Trustee or any Person affiliated with any Trustee, provided that such contract or such transaction is approved by the unanimous vote of the Trustees, it being understood that, to the extent permitted by law, the usual rules prohibiting fiduciaries from dealing with themselves as individuals or from dealing with respect to any matter in which they have a personal interest shall not apply to the Trustees;

(xvi) delegate any or all of the discretionary power and authority herein conferred at any time with respect to all or any portion of the Trust estate to any one or more reputable individuals or recognized institutional advisers or investment managers without liability for any action taken or omission

made because of any such delegation except as provided in Section 5.04;

(xvii) consult with New UNR at such times and with respect to such issues relating to the conduct of the Trust as the Trustees consider desirable; and

(xviii) merge with any other claims resolution facility if the Trustees shall determine by unanimous vote, after consultation with and the consent of the TAC, that the purposes and substantive procedures of such other claims resolution facility are consistent with the Procedures, which determination by the Trustees shall be final, binding and non-appealable.

(d) The Trustees shall not have the power to guarantee any debt of other Persons.

* * *

(3)

No. 06-94

Supreme Court, U.S.
FILED
AUG 21 2006
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

FULLER-AUSTIN INSULATION CO.
Petitioner,

v.

HIGHLANDS INSURANCE CO., *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APELLATE DISTRICT, DIVISION TWO

RESPONDENTS' BRIEF IN OPPOSITION

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August 21, 2006

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

QUESTION PRESENTED

Should this Court grant certiorari to review an interlocutory decision of a state intermediate appeal court that presents, in that court's words, only "the state law issues left open by a section 524(g) bankruptcy plan that expressly provides it does not affect the debtor's and insurer's policy rights"?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondents Certain Underwriters at Lloyd's, London and Certain London Market Insurance Companies (collectively "London Market Insurers") include a number of insurance underwriters and companies that subscribed, severally and not jointly, to insurance policies issued to petitioner Fuller-Austin Insulation Company ("Fuller-Austin"). Pursuant to Supreme Court Rule 29.6, London Market Insurers make the following disclosure with respect to the respondents listed below:

Underwriters at Lloyd's, London

Certain Underwriters at Lloyd's, London are natural persons who are or were members of underwriting syndicates at Lloyd's, London who subscribed, each for their own share and not for the share of others, to stated percentages of policies issued to Fuller-Austin.

Ag De 1830 Comp Belge/ AG Belge

Ag De 1830 Comp Belge / AG Belge is owned by AG Groep.

Allianz International Insurance Company Ltd.

Allianz International Insurance Company Ltd. is now Allianz Cornhill Insurance plc, which is part of the Allianz Group. Its immediate parent is Allianz Aktiengesellschaft.

Camat Per Credit Underwriting Agency Ltd.

Camat Per Credit Underwriting Agency Ltd. is handled by Whittington Insurance Services Ltd. The holding company of Whittington Companies is Omni Whittington Syndicate Services, which is a private limited company.

Dominion Insurance Company Ltd.

The ultimate holding company of Dominion Insurance Company Ltd. is B.D. Cooke Investments, Ltd. Its immediate holding company is Dominion Insurance Holdings, Ltd., a privately held company.

CORPORATE DISCLOSURE STATEMENT – continued

Excess Insurance Company Ltd.

Excess Insurance Company, Ltd. is a wholly-owned subsidiary of the Hartford Financial Services Group, Inc., a publicly held company.

St. Katherine's Insurance Company PLC

St. Katherine's Insurance Company PLC is now part of St. Paul International Insurance Company Ltd., which is part of The St. Paul Travelers Companies.

Storebrand Insurance Company (UK) Ltd.

Storebrand Insurance Company (UK) Ltd. is now Oslo Reinsurance Company (UK) Ltd. It is owned by Oslo Reinsurance Company ASA. The ultimate parent company is Storebrand Skadeforsikring AS.

Stronghold Insurance Company Ltd.

The parent company of Stronghold Insurance Company, Ltd. is Stronghold Holdings Ltd., which is a private limited company.

Taisho Marine & Fire Insurance Company (Europe) Ltd.

Taisho Marine & Fire Insurance Company (Europe) Ltd. is now Mitsui Sumitomo Insurance Company (Europe) Limited, which is owned by Mitsui Sumitomo Insurance Ltd.

Tokio Marine & Fire Insurance Company (Europe) Ltd.

Tokio Marine & Fire Insurance Company (Europe) Ltd. is now Tokio Marine Europe Insurance Ltd. Its immediate parent is The Tokio Marine & Fire Insurance Company Ltd., and the ultimate holding company is Millea Holdings Inc.

Turegum Insurance Company Ltd.

Turegum Insurance Company Ltd. is a wholly-owned subsidiary of Castlewood, Ltd., a private limited company.

Respondent Transcontinental Insurance Company is an insurance company domesticated in the State of New York and has its principal place of business in Chicago, Illinois. Transcontinental Insurance Company is not publicly traded. All of Transcontinental's common stock is owned by National

CORPORATE DISCLOSURE STATEMENT – continued

Fire Insurance Company of Hartford, which is not publicly traded. All of National Fire's common stock is owned by Continental Casualty Company. Continental Casualty Company is not publicly traded. All of Continental Casualty's common stock is owned by The Continental Corporation, which is not publicly traded. All of The Continental Corporation's common stock is owned by CNA Financial Corporation, which has issued shares to the public. Loews Corporation owns the majority of the stock of CNA Financial Corporation and is publicly traded. No other corporation owns 10% or more of the stock of CNA Financial Corporation. CNA Surety Corporation is a publicly held affiliate of Continental Casualty Company.

Respondent Columbia Casualty Company is not publicly traded. All of Columbia Casualty Company's stock is owned by Continental Casualty Company. Continental Casualty Company is not publicly traded. All of Continental Casualty Company's common stock is owned by The Continental Corporation, which is not publicly traded. All of The Continental Corporation's common stock is owned by CNA Financial Corporation, which has issued shares to the public. Loews Corporation owns the majority of the stock of CNA Financial Corporation and is publicly traded. No other corporation owns 10% or more of the stock of CNA Financial Corporation. CNA Surety Corporation is a publicly held affiliate of Continental Casualty Company.

Respondent Stonewall Insurance Company is a wholly owned subsidiary of Stonewall Acquisition Corporation. Stonewall Acquisition Corporation is a wholly owned subsidiary of Dukes Place Holdings, L.P. The following entities have an indirect ownership interest in Dukes Place Holdings, L.P.: Dukes Place Holdings Ltd.; Cavell USA Inc.; Dukes Place Holdings LLC; DP Holdings LLC; Greenwich Street Capital Partners II, L.P.; Greenwich Street Investments II, LLC; The Travelers Insurance Company.

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RESPONDENTS' BRIEF IN OPPOSITION

INTRODUCTION

This petition does not present an issue within this Court's certiorari jurisdiction or that otherwise satisfies this Court's well-established standards for review. The decision below as challenged by petitioner is based entirely on an unremarkable and clearly correct interpretation of California law and the petition does not present any federal issue within this Court's jurisdiction to review. Moreover, the decision below is an interlocutory decision of a state intermediate appellate court that does not present the "final judgment" that is jurisdictionally required under 28 U.S.C. § 1257 for certiorari review of state-court rulings. There is no conflict among the lower courts on any issue of federal law: the supposed conflict claimed by the petition is actually a difference in outcome in cases decided under the laws of two different *states* dealing with different sets of facts. The petition further egregiously misstates both the facts and the ruling of the court below. Finally, the petition's assertions about the supposed importance of the decision below are likewise grossly exaggerated. Pet. App. 23a. In short, the petition presents none of the reasons for granting review and virtually every reason for denying it.

STATEMENT

1. From the 1940s to the 1980s, petitioner Fuller-Austin Insulation Co. was involved in the installation and removal of building materials containing asbestos. Beginning in the late 1980s and accelerating thereafter, petitioner began to face large numbers of personal-injury lawsuits from claimants exposed to its asbestos materials. By 1993, petitioner began to fear that these lawsuits might exhaust the policy limits of its primary layer of liability insurance coverage. It therefore sent letters to respondents — insurance companies which had issued excess insurance policies that

could potentially apply only after petitioner's liability for covered claims exceeded primary and underlying insurance limits — putting them on notice of the asbestos claims. After several of the excess insurers responded by asking for additional information or reserving rights, petitioner filed a coverage action against respondents in California state court under California law seeking to establish the fact and scope of coverage for "past, present and future" asbestos claims. Pet. App. 4a-6a.

2. While the coverage litigation was pending, petitioner began negotiating a so-called "prepackaged" bankruptcy plan with certain selected plaintiffs' lawyers representing asbestos claimants. Respondents were not represented in these negotiations and petitioner did not seek their approval either of the negotiations or of the plan that ultimately emerged. Pet. App. 7a-8a.

Negotiating in respondents' absence, petitioner and the asbestos plaintiffs' lawyers devised a bankruptcy Plan under which respondents would be called upon to pay the overwhelming bulk of the money. Under the Plan, petitioner's parent company would pay "approximately $14 million in cash and other assets," petitioner would "contribute[] its insurance policies as well as its continued prosecution of [the] coverage action," and petitioner and its parent company would receive "a full release and injunction barring any further litigation against them concerning present or future asbestos claims." Pet. App. 9a. The respondents, on the other hand, were to be held responsible for some hundreds of millions of dollars. Pet. App. 16a. To assist in the pursuit of this amount, the Plan contrived payment provisions designed to create the appearance of massive liability. Each asbestos claim would be nominally assigned a high "allowed liquidated value" or "ALV," but these ALVs were entirely notional: the Plan "expressly provided that a claimant would receive only a periodically adjusted 'Payment Sum Percentage' of the ALV . . . that would amount to only a fraction of

the ALV." Pet. App. 9a.[1] The original Plan (prior to the modification discussed below) further provided that the bankruptcy court would, on the basis of these "ALV" numbers, "determine an aggregate amount" that petitioner would ostensibly "be legally obligated to pay." Pet. App. 9a-10a.

3. On September 4, 1998, after the Plan was fully negotiated, petitioner filed for protection in the District of Delaware, seeking confirmation of the Plan under section 524(g) of the Bankruptcy Code, 11 U.S.C. § 524(g). The Plan was then sent to respondents, who received it "approximately two weeks after the filing." Pet. App. 8a. Respondents immediately filed objections to the Plan and sought to intervene in the bankruptcy proceedings. Pet. App. 10a.

In response, petitioner quickly amended the Plan to delete the provision requiring the bankruptcy court to determine an aggregate amount of petitioner's alleged asbestos exposure, Pet. App. 10a, and to "expressly provide[] [that the Plan] does not affect [respondents'] policy rights" as interpreted in accordance with "state law." Pet. App. 23a. The amendment added the following explicit provision:

> Notwithstanding any other provision in this Plan, all claims and defenses of any Asbestos Insurance Company that is a party to the Coverage Litigation [*i.e.*, the previously pending California state-court coverage suit] shall be adjudicated in the Coverage Litigation, and all rights of the Asbestos Insurance Companies under the Asbestos Insurance Policies shall remain *unaffected* by the Plan and the [bankruptcy court's] Confirmation Order.

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[1] The notional ALV amounts recited in the Plan were in fact more than five times greater than the actual amounts petitioner had historically paid to settle claims. Reflecting that reality, the "Payment Sum Percentage" — *i.e.*, the "fraction" of the ALVs that the trust established by the Plan is actually obligated to pay to claimants — is now set at 18.5%.

— Pet. App. 10a (emphasis added).

Petitioner then urged the bankruptcy court to deny respondents' intervention motion for lack of standing, arguing that this amendment to the Plan meant that respondents "simply do not have any interest as affected by this plan of reorganization." Pet. App. 11a. As the court below found, "[d]uring the course of the bankruptcy proceedings, the bankruptcy court and all parties repeatedly represented that the Plan would have no impact on [respondents'] claims and defenses in the coverage litigation." Pet. App. 42a-43a; *see also* Pet. App. 44a (describing petitioner's "repeated representations that the Plan and its confirmation did not affect [respondents'] rights under their policies or their claims and defenses in the coverage litigation"). As petitioner's counsel told the bankruptcy court: "I think we have made perfectly clear in our amendment to the plan of reorganization that [respondents'] rights are not affected, and we have made perfectly clear in our amended plan that their claims and defenses in the [California] coverage litigation [are] not affected." Pet. App. 11a-12a.[2]

On the basis of these representations, the bankruptcy court ruled that respondents lacked standing to intervene, reasoning that they "were 'not directly and pecuniarily affected by the proposed Plan.'" Pet. App. 12a. Accordingly, the bankruptcy court did not take up or rule upon whether the Plan was "unfair, unreasonable or the product of fraud or collusion" as to respondents. Pet. App. 44a-45a. Instead, the bankruptcy court went on to confirm the Plan in a Confirmation Order explicitly "providing that [respondents'] rights

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[2] *See also* Pet. App. 11a ("What we have done [through the amendment to the Plan is] to make it clear, to the extent there is any doubt . . . that all of their rights under those policies are unaffected by the plan of reorganization"; "[w]e have tried to make clear . . . that these proceedings have absolutely no impact on the [coverage litigation] proceedings in California in terms of the claims and defenses that those carriers have raised and are litigating in California.").

under their policies were to remain unaffected by the Plan." Pet. App. 12a.

4. After thus securing confirmation of the Plan on this basis, petitioner abruptly made a 180 degree turn. It "adopted a position [in the California coverage litigation that] it did not take in the bankruptcy proceedings": that the Plan *did* dramatically affect respondents' rights. Pet. App. 13a. Petitioner claimed: *First*, that even though there had been no trial and even though respondents had not agreed to the Plan, the Plan nonetheless was a "final judgment . . . after actual trial" or an "agreement of the Insured, claimant, and the [insurer]" that gave rise to obligations under respondents' policies to indemnify petitioner's liability under the Plan. Pet. App. 5a;[3] *Second*, that the policies required that respondents' coverage obligations be determined on the basis of the Plan's notional ALVs, and not the fraction of the ALVs that the claimants were actually designated to receive, Pet. App. 14a, 54a; and *Third*, that the jury should determine the aggregate estimated amount of all present and future asbestos claims against petitioner with respondents then being liable to pay that total amount up-front — *i.e.*, long before *any* payment would be made to the overwhelming majority of asbestos claimants.[4] Pet. App. 14a. Petitioner expressly sought these rulings under California law.

The trial court ruled in petitioner's favor on all of these issues. It held that the Plan was both a "final judgment" and an "agreement" within the meaning of the policies, and that

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[3] The relevant policy language provides that respondents have no obligation to indemnify petitioner until "after the Assured's liability shall have been fixed and rendered certain either by final judgment against the Assured after actual trial or by written agreement of the Assured, the claimant, and [insurer]." Pet. App. 25a.

[4] The state-court jury would ultimately determine that over 75% of the total dollar amount of claims constituted "future claims." Pet. App. 16a.

respondents' indemnity obligations were to be measured on the basis of the ALVs. It further held that — even though the policies would ordinarily obligate respondents to indemnify petitioner's covered liability to individual claimants only as those claims actually arose and were resolved over the years — the advent of the Plan meant that respondents were now obligated under the policies to pay an up-front lump-sum based upon a projected statistical estimate of the total ALVs assigned to all pending and projected future asbestos claimants who might come forward. Pet. App. 13a-14a. In a subsequent phase of the trial court proceedings, a jury acting pursuant to the trial court's instructions — one of which was that the jury should "presume" that *all* of the asbestos claims were "harm within the coverage provided by [respondents'] insurance policies" — projected this total amount to be just short of $1 billion. Pet. App. 15a-16a.

5. The California Court of Appeal affirmed in part and reversed in part. It began by noting the state-law nature of the issues in the case, explaining that its task was to "resolv[e] the state law issues left open by a section 524(g) bankruptcy plan that expressly provides it does not affect the debtor's and insurer's policy rights." Pet. App. 23a.

Accordingly, the Court of Appeal applied "California law" in addressing these issues. Pet. App. 25a, 33a, 34a, 47a, 56a. *First*, it held that the Plan constituted a "settlement," and thus did not comprise a "final judgment . . . after actual trial." It also held that this "settlement" would not be an "agreement of the Insured, claimant, and the [insurer]" within the meaning of the policies unless it were first found not to be "unfair, unreasonable or the product of fraud or collusion" as to respondents. Pet. App. 29a, 42a-45a. Because the bankruptcy court — relying on petitioner's representations that the Plan did not affect respondents' rights — had specifically not considered this issue, the Court of Appeal remanded the case for the trial court to make this determination. Pet. App. 44a-45a. Moreover, in connection with this remand, the Court of Appeal also made clear that the trial court's instruction that the jury should "presume"

that the asbestos claims were "harm within the coverage" of the policies was erroneous, and thus that petitioner — even if it succeeded in showing that the Plan is fair, reasonable, non-fraudulent and non-collusive — also needed to prove on remand that the asbestos claims at issue were "harm within [the] coverage." Pet. 62a-67a.

Second, the Court of Appeal held that, because the policy language limits respondents' indemnity obligations only to "amounts [petitioner] is 'obligated to pay' by law," any coverage obligations found to exist after remand were to be determined only on the basis of amounts that the trust set up by the Plan was actually obligated to pay each claimant. Pet. App. 54a-60a. On this point, the Court of Appeal concluded that the Plan "expressly and unambiguously" provided that this amount was the payment sum percentage each claimant was designated to receive, and *not* the notional ALVs, Pet. App. 58a: "[T]he ALV does not reflect Fuller-Austin's legal obligation to each claimant and therefore cannot be used as the basis for fixing appellants' indemnity obligations." Pet. App. 56a.

Third, the Court of Appeal ruled that for the trial court to have held respondents liable to pay up-front the "jury's estimation of the value of present and potential future asbestos claims" against petitioner was an "unlawful acceleration" of respondents' contractual obligations to indemnify Fuller-Austin. Pet. App. 45a-46a.

In sum, the Court of Appeal held the following: If the Plan were determined on remand or subsequent appeal to be "unfair, unreasonable or the product of fraud or collusion," respondents would have no coverage obligations at all arising out of any part of the Plan. If not, and if petitioner proved that the asbestos claims at issue are harm within the policies' coverage, respondents' coverage obligations would be based on the payment sum percentage amounts that claimants were actually paid under the Plan when such payments were made. Pet. App. 60a, 67a.

Petitioner sought review from the California Supreme Court only on the second of the three issues described

above. *See* Petition for Review of plaintiff Fuller-Austin Insulation Co., filed Feb, 28, 2006 (Cal. Sup. Ct.), at 12 & n.2.[5] It did *not* seek review of the Court of Appeal's remand for a determination whether the Plan was unfair, unreasonable, fraudulent or collusive as to respondents *or* as to the court's holding that respondents do not have to pay projected coverage obligations in an up-front lump sum. On April 19, 2006, the California Supreme Court denied review in all respects. Pet. App. 264a. Petitioner then filed this petition with this Court, seeking review *only* of the California Court of Appeal's ruling that respondents' coverage obligations — should they have any after the remand proceedings — are not to be based on the ALVs.

REASONS FOR DENYING THE WRIT

The petition seeks review of an interlocutory ruling of a State intermediate appellate court that was decided on state-law grounds. For a number of reasons, there is no warrant — or, indeed, jurisdiction — for this Court to grant certiorari in this case.

1. ***The petition does not present a federal-law issue.***— The petition should be denied because, as the California Court of Appeal made unmistakably clear, the decision below is based entirely on state law. No federal question is presented in the case and the Court accordingly lacks jurisdiction for this reason. *See* 28 U.S.C. § 1257(a); *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945) ("Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights.").

As set forth more fully above, the issue on which petitioner seeks review is whether, under the terms of respondents' insurance policies, the policy language providing that

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[5] Petitioner also sought review of the Court of Appeal's holding that the trial court's instruction that the jury should "presume" harm within the coverage was erroneous.

respondents are to indemnify petitioner only for "amounts it is 'obligated to pay' by law" requires respondents to pay the notional ALV amounts, rather than the small fraction of those amounts that the Plan actually obligates the trust to pay to asbestos claimants. Pet. App. 54a-55a. Contrary to the petition's attempt to suggest that the California Court of Appeal somehow rested its resolution of this issue on a construction of section 524(g) of the Bankruptcy Code, the opinion below makes perfectly clear that the decision is based entirely on state insurance law. Pet. App. 23a (this case concerns "the *state law issues* left open by a section 524(g) bankruptcy plan that expressly provides it does not affect the debtor's and insurer's policy rights") (emphasis added). Accordingly, the Court of Appeal determined — expressly applying "California law" (Pet. App. 56a) — that the policies' provision limiting indemnification to amounts petitioner is "obligated to pay" meant that respondents would be required to reimburse only amounts that the trust was actually obligated to pay to claimants under the Plan, and not the more-than-five-times-higher ALVs. Pet. App. 55a-58a. Petitioner may disagree with the California court's interpretation of California law, but that state-law dispute is not a matter for this Court's review.

Moreover, despite the petition's cursory reference to two of this Court's preemption cases (Pet. 23), this case does not and could not present any issue that a section 524(g) bankruptcy plan somehow preempts the California insurance law that governs the policies and retroactively abrogates respondents' state-law contractual rights under the policies. In the first place, no claim was raised in the court below that section 524(g) preempts California insurance law or abrogates respondents' California-law rights under the policies.[6]

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[6] *See* Appeal Brief of Fuller-Austin Insulation Co., filed April 22, 2005 (Cal. Ct. of Appeal), at 50-54 (arguing that respondents' obligations should be based on the ALVs as a matter of "the policy language, California law, and insurance industry custom and practice," and not raising any preemption claim).

See, e.g., Adams v. Robertson, 520 U.S. 83, 86 (1997) (this Court will not review a federal question raised by a state-court judgment unless that question was properly presented to the state courts). More fundamentally, on the facts of this case, no such claim could have been raised. As fully detailed above, both the 524(g) Plan in this case *and* the bankruptcy court order confirming it expressly *disclaimed* any intention here to affect or alter respondents' rights under the policies as interpreted in accordance with state law: as the California Court of Appeal noted, both the Plan and the bankruptcy court confirmation order had explicitly provided that "[respondents'] rights under their policies were to remain unaffected by the Plan." Pet. App. 12a; *see* pp. 3-5, *supra*.[7]

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[7] Although petitioner's failure to raise any such issue below and the Plan's and the bankruptcy court's express disavowal of any intent to preempt or abrogate respondents' state-law contractual rights foreclose any such claim here, it should also be noted that a claim that section 524(g) preempts state insurance law and retroactively abrogates insurers' state-law contractual rights would be totally without merit for other reasons as well. The sole reference in section 524(g) to insurance or insurers is a provision that, far from imposing extra-contractual obligations on insurers, actually *confers rights upon insurers*. 11 U.S.C. § 524(g)(4)(A)(ii)(III) (authorizing a bar on further asbestos claims against insurers who contribute to the trust). Moreover, although section 524(g) requires that the trust value and pay "present claims and future demands . . . in substantially the same manner" (11 U.S.C. § 524(g)(2)(B)(ii)(V)), nothing in the section suggests that, in order to satisfy the goal of equal treatment, insurers are required — policy provisions notwithstanding — to pay out *more* than the trust is obligated to disburse to claimants. Section 524(g) thus does not contain any language that could even remotely be described as preempting state insurance law or abrogating insurers' contractual rights, let alone language clear enough to overcome: (1) the general "presumption against the pre-emption" of state law (*e.g., Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)); (2) the further specific *anti*-preemption provision of the McCarran-Ferguson Act, which bars preemption of state laws "relat[ing] to" the regulation of the "business of insurance" (15 U.S.C. § 1012(a));

2. *The interlocutory nature of the California Court of Appeal's ruling renders the petition beyond this Court's certiorari jurisdiction and otherwise unfit for review.*— The petition should also be denied because, although the issue raised will not be certworthy at any juncture of the case, review is particularly inappropriate at this interlocutory stage of the proceedings. As the petition concedes, "the decision below is . . . interlocutory." Pet. 14. As detailed above, in a ruling that petitioners do not challenge, the California Court of Appeal remanded this case to the trial court for a determination whether the Plan is "unfair, unreasonable or the product of fraud or collusion" as to respondents. Pet. App. 45a. If the trial court determines that it is any of the above, petitioner does not contest that respondents will then have no obligations under their insurance policies arising out of the Plan.[8] In that event, peti-

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or (3) the settled rule that a statute will not be construed to impose obligations on private parties retroactively absent a "clear" statement of such intent in the statutory language (*e.g.*, *Landgraf v. USI Film Products*, 511 U.S. 244, 268-272 (1994)). And it goes without saying that any attempt to construe section 524(g) as abrogating insurers' contractual rights and imposing extra-contractual liability on them retroactively would, at a minimum, raise substantial constitutional questions under the takings and due process clauses. *See, e.g.*, *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998).

[8] Given the provisions of the Plan, the manner in which it was negotiated and petitioner's misrepresentations of its intentions before the bankruptcy court (*see* pp. 2-5, *supra*), respondents submit that it is quite likely that the Plan will be found on remand to be unfair, unreasonable, fraudulent or collusive as to respondents, and that this case will therefore end there. The large potential for collusion and unfairness in this sort of situation — where an asbestos defendant and some selected plaintiffs' lawyers negotiate a pre-packaged asbestos arrangement without the insurers' participation, but which calls for the insurers to supply almost all of the money — is both obvious and well-recognized. For one recent example, *see In re Congoleum Corp.*, 426 F.3d 675 (3d Cir. 2005). We note that petitioner and certain respondents affiliated with Hart-

tioner does not dispute that the issue it raises — whether the California Court of Appeal correctly interpreted the extent of one aspect of respondents' alleged obligations under their policies if the Plan gives rise to any such obligations — would be moot. Other issues remain to be sorted out on remand as well, including whether petitioner can satisfy its burden of proving that the asbestos claims are harm within the policies' coverage.

Because the petition thus arises from a state-court ruling that petitioner concedes is interlocutory, this Court lacks jurisdiction to grant review for this reason as well. Under 28 U.S.C. § 1257(a), this Court's certiorari jurisdiction over state-court decisions is limited to "[f]inal judgments or decrees." This statutory limitation on certiorari jurisdiction "establishes a firm final judgment rule." *Jefferson v. City of Tarrant*, 522 U.S. 75, 81 (1997). Accordingly, "[t]o be reviewable by this Court, a state-court judgment must be final . . . as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein." *Id.*

As the Court has emphasized, this "finality rule 'is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system.'" *Id.* (*quoting Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945)). As a result, "[i]n general, the final-judgment rule has been interpreted to preclude reviewability . . . where anything further remains to be determined by a State court." *Flynt v. Ohio*, 451 U.S. 619, 620 (1981). The Court has thus repeatedly dismissed writs of certiorari for want of jurisdiction where, as here, a state court has remanded for further trial proceedings or fact-finding that could moot the issue raised in the petition. *See, e.g., Jefferson*, 522 U.S. at 81-82 (remand for "trial on the merits" that

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ford Insurance Co. (which have relatively small exposure to the Fuller-Austin risk and which have opted not to respond to the petition) have entered into a structured settlement such that they will not be participating in the trial court proceedings upon remand.

"could effectively moot" the issue presented by the petition); *O'Dell v. Espinoza*, 456 U.S. 430 (1982) (per curiam) ("Because the Colorado Supreme Court remanded this case for trial, its decision is not final as an effective determination of the litigation.").

Although acknowledging that the judgment below is interlocutory, petitioner makes no attempt to address how this Court nonetheless has jurisdiction to grant review. The only reason petitioner gives why this Court should grant review despite the conceded interlocutory nature of the decision below is an appeal to the "exigency of the asbestos litigation crisis." Pet. 14. Nowhere does petitioner explain how this "exigency" empowers the Court to hear cases in excess of its settled jurisdiction.[9]

Moreover, beyond this jurisdictional bar, the interlocutory nature of the decision presents other reasons why the petition should not be granted. Even where petitions from decisions of the lower *federal* courts are concerned — where this Court's certiorari jurisdiction is *not* limited to final judgments, *see* 28 U.S.C. § 1254(1) — this Court adheres to an ordinary practice of denying review of interlocutory deci-

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[9] Certainly the petition makes no attempt to contend that this petition falls within "the limited set of situations in which [the Court] ha[s] found finality . . . despite the ordering of further proceedings in the lower state courts." *Jefferson*, 522 U.S. at 82. Nor could it. This is not a situation where the issue raised by the petition "will survive and require decision regardless of the outcome of future state-court proceedings." *Id.* To the contrary, petitioner does not dispute that if respondents prevail on remand below, the issue raised by the petition will be moot. Nor is this an instance where the issue raised by the petition "has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Id.* If petitioner prevails on remand, it can then pursue further review of the issue raised in the petition at that time (although we emphasize that the issue will remain unworthy of this Court's review, among other reasons because it is not an issue of federal law).

sions. *See, e.g., Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916) ("[E]xcept in extraordinary cases, the writ is not issued until final decree," so the interlocutory nature of the decision below is "a fact that of itself alone furnished sufficient ground for the denial of the application" for review by this Court).[10] Once again, the petition provides no reason why this state-law decision by a state intermediate appellate court should be considered an "extraordinary case." To the contrary, the various reasons cited for the Court's practice of awaiting final judgment — including avoidance of what would be an advisory opinion if further proceedings mooted the issue raised in the petition, avoidance of deciding alleged constitutional questions in advance of the necessity of doing so, and allowing the Court to assess any federal-law issue upon a complete and settled record[11] — all counsel in favor of denying interlocutory review here.

3. ***There is no conflict of federal law with the UNR case.***— Contrary to the petition's claim, there is no conflict of federal law between the California Court of Appeal's decision and *UNR Industries, Inc. v. Continental Cas. Co.*, 942 F.2d 1101 (7th Cir. 1991). The two decisions were each expressly decided not on the basis of federal law, but on the basis of the respective state laws governing the issues here

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[10] *See also Bhd. of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court. The petition for a writ of certiorari is denied."); Robert L. Stern & Eugene Gressman, *et al.*, SUPREME COURT PRACTICE § 4.18, at 260 (8th ed. 2002) ("[I]n the absence of some . . . unusual factor, the interlocutory nature of a lower court judgment will generally result in a denial of certiorari.").

[11] *See, e.g., Radio Station WOW*, 326 U.S. at 123-24; *North Dakota Pharmacy Bd. v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 159 (1973); William J. Brennan, Jr., *Some Thoughts on the Supreme Court's Workload*, 66 JUDICATURE 230, 231-32 (1983).

presented under the respective policies: this case under "California law," and *UNR Industries* under "Illinois law." See Pet. App. 23a, 56a; *UNR Industries*, 942 F.2d at 1104 ("UNR and the other parties have relied on Illinois law. We follow their lead . . . ."); *id.* at 1105 (stating, in the portion of the opinion relied upon by petitioner, that the ruling is based on interpretation of "Illinois law"). Indeed, the *UNR Industries* opinion could hardly be clearer that it was not announcing a rule of federal law, expressly stating at the very outset that no "federal interests are present in the current case, so *state law applies*." *Id.* at 1104 (emphasis added).[12] So when the California Court of Appeal said — in a sentence the petition wrenches out of context — that it would "decline to follow *UNR Industries* on this point," it was at most declining to import the Seventh Circuit's application of its interpretation of Illinois insurance law principles to one set of policies and facts into the application of California insurance law to another set of policies and facts. Pet. App. 60a. Of course, a difference in result produced by application of two state laws to separate policies under the facts and circumstances in the two cases is wholly unremarkable — and in any event cannot create a basis for this Court's review.

4. ***The petition badly distorts the actual decision below.***— Although the merits of the California Court of Appeal's determination of the state-law issues presented in this case are of no relevance here, it does bear brief mention that the petition's outlandish depiction of that determination has little resemblance to what the court below actually held.

Most fundamentally, the California Court of Appeal did *not* hold that respondents would "otherwise" have far higher "underlying liability," but that they should receive a "windfall" in the form of "a discount of their own liability as a result of the trust's obligation to comply with Section 524(g)."

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[12] Indeed, the *UNR Industries* opinion could not possibly have been based on section 524(g), since that section was not even enacted until three years after the case was decided.

Pet. 15-16. To the contrary, the court ruled — in a straightforward application of basic rules of contract law — that the policies' specification that respondents are required to reimburse petitioner only for "amounts it [*i.e.*, petitioner] is 'obligated to pay' by law" means that respondents have to reimburse only amounts that petitioner through the trust is actually obligated to pay to claimants under the Plan, and not the far-higher non-payable ALVs. Pet. App. 55a-58a. There was thus no "discounting" of respondents' obligations: they are simply responsible for reimbursing the "amounts" petitioner is "obligated to pay."[13] And if ultimately the total of the amounts actually paid out by the trust to present and future asbestos claimants for covered claims reach the policy limits, respondents would be required to pay out the full limits. There is no "windfall" or "discount" here.

The petition suggests otherwise only by blatantly manipulating a supposed quote from the opinion below. The linchpin of the petition's claim of a "discount" is the assertion that the California Court of Appeal supposedly held that, under the Plan, the full "ALV amounts . . . 'constitute a *binding liability of Fuller-Austin to the asbestos claimants.*'" Pet. 16-17 (quoting Pet. App. 67a) (emphasis in petition). Based on this assertion, the petition contends that, in requiring respondents to reimburse only what the trust actually pays to claimants, as opposed to the higher ALV amounts it supposedly had a "binding liability" to pay, the opinion below "discounts" respondents' supposed obligations. Pet. 15-17.

On inspection, however, the quoted "binding liability" language is *not* an expression of the *California Court of Appeal*'s views. To the contrary, the quoted language is actually a fragment from one sentence of the California Court of Appeal's recital of the *trial court's jury instructions*, which

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[13] As the California Court of Appeal pointed out, it is thus *petitioner*, not respondents, which seeks to use the bankruptcy filing to "redefine the scope of coverage" by contending that the Plan means that respondents have payment obligations greater than those called for by the policies' terms. Pet. App. 56a.

the appellate court was reciting for background purposes in an entirely different section of its opinion dealing with an entirely separate issue from that raised by the petition — a separate issue on which the appellate court similarly reversed the jury's verdict as "fatally defective." Pet. App. 67a-70a. Indeed, in the section of its opinion that actually deals with the issue raised by the petition, the California Court of Appeal *specifically rejected* the trial court's view that "the ALV of each claim is the amount of Fuller-Austin's legal obligation." Pet. App. 58a. In doing so, the appellate court expressly and repeatedly held just the opposite: that the Plan "establish[es] that the ALV does *not reflect Fuller-Austin's legal obligation to each claimant.*" Pet. App. 56a (emphasis added); *see also id.* at 58a ("[W]e read the Plan as expressly and unambiguously permitting the Trust's obligations to be satisfied by the payment sum percentage" and as providing "that the ALV is not binding."); *id.* ("[W]e do not read the Plan . . . as providing that Fuller-Austin's legal obligation to each claimant is the ALV amount.").

5. ***The petition greatly exaggerates the supposed importance of the decision below.***— Finally, the petition's dire descriptions of the decision below as posing a "threat" to "cripple[]" federal asbestos policy and the "entire statutory regime" (Pet. 7, 14, 18) are fanciful. The opinion below is not only an unremarkable determination of state law, it is the first and only case of its kind to have arisen in the 12 years since enactment of section 524(g). Pet. App. 23a (this is the first case "in the state courts resolving the state law issues left open by a section 524(g) bankruptcy plan that expressly provides it does not affect the debtor's and insurer's policy rights"). Petitioner's hyperbole aside, the decision below thus presents no demonstrably recurring issue having a demonstrable systemic impact on the nation. If in the future, asbestos insurance cases do arise that do fit that description and that actually do present a federal-law issue, the Court could consider whether to review them at that time. But that speculative possibility supplies no reason — nor does it supply the missing jurisdictional basis — for this Court to grant review now of an interlocutory decision of a

state intermediate appellate court that was decided entirely on state-law grounds and that presents no conflict or even an issue of federal law.

CONCLUSION

The petition for a writ of certiorari should be denied.

August 21, 2006

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FULLER-AUSTIN INSULATION COMPANY, f/b/o FULLER-AUSTIN ASBESTOS SETTLEMENT TRUST,

Petitioner,

v.

HIGHLANDS INSURANCE COMPANY, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The California Court Of Appeal, Second Appellate District, Division Two

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Respondents' overheated prose cannot obscure the reality that the California Court of Appeal has struck a crippling blow to Congress' lone legislative response to the Nation's asbestos litigation crisis. The decision below has transformed Section 524(g), enacted to ensure discounting of an asbestos trust's payments to present claimants for the sake of preserving assets for future claimants, into a siphon for diverting assets owing to the trust into the pockets of Respondent insurers. State law has thus been interpreted to starve the federal regime governing asbestos bankruptcies of essential insurance assets. Neither Respondents nor the court below denies that this result subverts the regime Congress enacted specifically to address the asbestos litigation crisis. The decision below warrants the plenary attention of this Court.

1. Respondents object that this Court lacks jurisdiction under 28 U.S.C. § 1257(a) because the state court decision below remanded for further proceedings with respect to some (but not all) of the Respondent insurance companies. Respondents' Brief in Opposition ("Opp.") at 11. But Respondents' "mechanical" notions of finality have been spurned by this Court for two centuries. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 477 (1975). As Chief Justice Taney explained, "the Court ha[s] not understood the final-judgment rule 'in this strict and technical sense, but has given [it] a more liberal, and, as we think, a more reasonable construction.'" *Id.* at 480-81 (quoting *Forgay v. Conrad*, 47 U.S. (6 How.) 201, 203 (1848)) (alteration in original).

> There are now at least four categories of such cases in which the Court has treated the decision on the federal issue as a final judgment for purposes of 28 U.S.C. § 1257 and has taken jurisdiction without awaiting the completion of the additional proceedings. . . .

Id. at 477. Of particular import is the category in which "the federal issue would not be mooted or otherwise affected by the proceedings yet to be had because those

proceedings . . . are wholly unrelated to the federal question." *Id.* at 478. Respondents concede that the remand has nothing to do with the federal issue presented here, but will instead involve only a "determination whether the Plan is 'unfair, unreasonable or the product of fraud or collusion'" under State law. Opp. at 11 (quoting App. 45a). Respondents then assert that, "[i]f the trial court determines that it is any of the above, petitioner does not contest that respondents will then have no obligations under their insurance policies arising out of the Plan." Opp. at 11.

In fact, Respondents' assertion is untrue and Petitioner *does* contest it, because the remand applies only to *some* Respondents. There are several Respondents who retain "obligations under their insurance policies" *regardless* how the remand proceedings turn out. Six Respondents have reached settlements with Petitioner under which the *only* dispute remaining is "whether [the insurer] is obligated to indemnify the Trust for the Allowed Liquidated Value . . . of individual claims . . . or the amount the underlying claimants actually receive, *i.e.*, the Allowed Liquidated Value times the Payment Percentage (the 'ALV Issue')."[1]

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[1] Settlement Agreement Between Fuller-Austin and First State Ins. Co., New England Reinsurance Corp., and Twin City Fire Ins. Co. (collectively "Hartford") at § I.A. The same provision is found in the other two settlements. *See* Settlement Agreement Between Fuller-Austin and TIG Ins. Co. as successor to Int'l Ins. Co. and Int'l Surplus Lines Ins. Co. ("International") at § I.A; Settlement Agreement Between Fuller-Austin and Columbia Casualty Co. and Transcontinental Ins. Co. (collectively "CNA") at § 3.a. Respondents bury the existence and import of one of the three settlements (Hartford's) in a cryptic footnote. Opp. at 11-12 n.8. This is surprising, insofar as Respondent CNA, a signatory to the Opposition, is a party to one such settlement and knows better. Respondents offer as an aside that the excess insurers who have settled "have relatively small exposure to the Fuller-Austin risk." Opp. at 11-12 n.8. Though Respondents may dismiss this exposure as "small," it in fact offers the prospect of millions of dollars in excess coverage for asbestos victims who otherwise stand to receive as little as $15,000 for the most grievous possible condition, mesothelioma,

(Continued on following page)

That is the federal question presented here. These settling Respondents have waived all other rights and defenses, including the "unfair, unreasonable or fraudulent" defense that is the subject of the remand, and have stipulated that they will "not participate at the trial court level unless or until there is a remand on . . . the ALV Issue and then only on th[at] issue[]."[2] Their payment to Petitioner of certain designated insurance proceeds is conditioned exclusively upon Petitioner prevailing in this coverage litigation on the federal issue presented here.[3]

With respect to these six settling Respondents, therefore, the proceedings in the State trial court on remand are irrelevant. Indeed, the settling insurers have stipulated that they will not participate in those remand proceedings, and that the federal issue decided by the state court below and now presented in the Petition is dispositive of their payment obligations.[4] As such, this case falls squarely within one of the well-established exceptions to the Section 1257 finality requirement: "the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." *Cox*, 420 U.S. at 480. "Nothing that could happen in the course of the [remand proceeding], short of settlement of the case, would foreclose or make unnecessary decision on the federal question." *Id.* This Court's jurisdiction under Section 1257 is beyond dispute.

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see infra at 6, and who would hardly deem it inconsequential. In no event, of course, would the magnitude of the coverage at issue bear upon the question of jurisdiction.

[2] Hartford Settlement at § IV.A & B; International Settlement at § IV.A & B; CNA Settlement at § 3.c.

[3] Hartford Settlement at § IV.C & D; International Settlement at § IV.C & D; CNA Settlement at § 3.b. & c. "There is no suggestion that 'the remaining litigation may raise other federal questions.'" *North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores*, 414 U.S. 156, 163 (1973) (quoting *Radio Station WOW v. Johnson*, 326 U.S. 120, 127 (1945)).

[4] The total of these contingent payments is $3,150,000.

Nor do any prudential concerns counsel against this Court's exercise of jurisdiction. The issue of federal law, the ALV issue that six Respondents have cleanly set apart and preserved in their settlement agreements, is presented here in a form that is equally neat and uncluttered. As Justice Frankfurter has explained, even the statutory jurisdictional requirement of finality must be tempered to accommodate "situations where intermediate rulings [by state courts] may carry serious public consequences." *Radio Station WOW v. Johnson*, 326 U.S. 120, 124 (1945). *A fortiori*, prudential concerns must likewise give way to the need to enforce important congressional policies. *See Local 438, Construction & Gen. Laborers' Union v. Curry*, 371 U.S. 542, 550 (1963) ("postponing review would seriously erode . . . national labor policy"); *Hudson Distribs. v. Eli Lilly & Co.*, 377 U.S. 386, 389 & n.4 (1964) (federal antitrust policy). The congressional program for dealing with the national asbestos litigation crisis is threatened by the decision below and warrants the Court's immediate attention, particularly in light of this Court's pointed expressions of alarm. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 & n.1 (1999); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 598 (1997); Pet. at 2.

2. Respondents protest that certiorari is unwarranted because the decision below was based on state law. Opp. 8-9. But that does not distinguish this case from *any* preemption case where a State has derogated federal commands in favor of its own laws. *See Perez v. Campbell*, 402 U.S. 637, 651-52 (1971). The court below *expressly acknowledged* that its decision subverted Section 524(g)'s purpose, which was to ensure equality among and ease the plight of asbestos victims, and that it was doing so for the benefit of insurers, by easing their coverage obligations instead. *See* App. 4a, 56a. Respondents neither deny that subversion nor defend it. Moreover, as both we and our *amici* have explained, federal law necessarily governs and cabins the import of a bankruptcy discharge and attendant discounting of ALV values it contemplates; by distending

those as it has, the court below has run afoul of that law separate and apart from any question of California law.[5]

It is similarly disingenuous for Respondents to deny the conflict between the court below in this case and the Seventh Circuit in *UNR Industries, Inc. v. Continental Casualty Co.*, 942 F.2d 1101 (7th Cir. 1991). It matters not that *UNR* was decided under "Illinois law" whereas the decision below was decided under "California law," Opp. at 15, because the UNR regime is what Congress codified as federal law. *See* Pet. at 5-7. Respondents deny neither that Congress modeled 524(g) on the UNR bankruptcy plan, nor that the bankruptcy plan here is indistinguishable from UNR's in all relevant respects. *See* Pet. at 19-23.

The court below, unlike Respondents, was at least forthright about its reasons for "declin[ing] to follow *UNR Industries*."[6] App. 60a. The California Court of Appeal did not point to any difference between its law and that of Illinois. Nor did it identify any differences between these insurance contracts and those at issue in *UNR*. The decision below pointed solely to the defining feature of this trust as established pursuant to Section 524(g) – namely, the differential between the "[higher] ALV amounts" owed by the trust to asbestos claimants and the lower "payment sum percentage received by each asbestos claimant" in

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[5] Respondents try to harmonize the decision below with Section 524(g) by claiming that its "sole reference . . . to insurance or insurers is a provision that . . . actually *confers rights upon insurers*." Opp. at 10 n.7. But that is answered by the submission of the *amici* asbestos trusts. The *raison d'etre* of the companion provision, Section 524(e), is to prevent third parties from escaping or reducing their liability on the basis of a bankrupt entity's discharge. *See Amicus* Brief of Babcock & Wilcox Company Asbestos PI Trust, *et al.* ("Am. Br.") at 6-7. That provision thus specifically limits the rights of the *insurers* of a bankrupt policyholder who might otherwise attempt to avail themselves of a discharge to reduce their coverage obligations.

[6] In an empty rhetorical flourish that typifies their Opposition, Respondents claim that this sentence has been "wrenche[d] out of context" by us, Opp. at 15 – without specifying what that context is or how the sentence could be read differently.

order to achieve equity of payouts between present and future claimants. App. 59a-60a. That feature of federal law, and it alone, drives the split between *UNR*, on which Congress modeled Section 524(g), and the decision below, which thwarts the congressional design.

3. According to Respondents, the problem is *not* that Petitioner's assets are inadequate to ensure payment to present and future claimants alike of proper damages for their injuries; instead, it is that the ALVs for those claims, which Respondents dismiss as "notional," are, Respondents say, wildly inflated relative to the Payment Sum Percentages ("PSPs") that Petitioner is actually able to pay. Opp. at 2, 3 n.1. Respondents call the ALV amounts "contrived payment provisions designed to create the appearance of massive liability." Opp. at 2.

That is false. The ALVs that Respondents paint as extravagant are in fact extremely modest: a claimant with mesothelioma – the extraordinarily painful and invariably fatal signature asbestos cancer – would receive but $58,500 if Petitioner were able to pay *all* projected claims *in their entirety*, which it cannot do.[7] Because Petitioner's assets are dwarfed by its asbestos liabilities (taking account of future claims, per 524(g)), claimants will, as Respondents concede, receive only a "fraction" of that amount, Opp. at 5, presently some $15,000 as calculated under the PSP. Given the constraints of policy limits and settlements, the PSP payout would stand to increase only to some $28,000 even under the trial court's ruling in favor of Petitioner.[8] Any fair-minded observer would surely recoil at this paltry compensation for so grievous an injury. But

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[7] ALVs decline from there: $25,500 for lung cancer; $15,500 for other cancers; $10,500 for asbestosis; and $5,500 for pleural disease.

[8] Although Respondents state that the PSP "is now set at 18.5%," Opp. at 3 n.1, it is in fact set at 26%. This PSP would increase to some 44% of the ALV were Respondents obligated to pay the higher amounts – as nonetheless limited by policy limits and settlements that have been entered – in accordance with the trial court's decision.

only Respondents would complain of the ALV amounts as though they were evidence of collusive *profligacy*.

The very purpose of Section 524(g) was to ameliorate the harsh reality that "asbestos companies [would be] forced into litigation and lose their ability to generate stock value and profits that can be used to satisfy claims," and to afford "reasonable assurance that the trust will value, and be able to pay, similar present and future claims in substantially the same manner." H.R. Rep. No. 103-835, at 41 (1994), App. 271a. The ALV and PSP amounts were determined just as Congress envisioned: through an arms-length negotiation, based on historical settlements and actual litigated outcomes, in connection with the same type of "prepackaged" bankruptcy plan endorsed by Congress (in the form of the Johns-Mansville and UNR bankruptcy trusts) when it enacted Section 524(g).[9]

Despite their bluster, Respondents cannot point to even a *single* difference between the ALV amounts and the standards set by the nation's long history of hundreds of thousands of asbestos claims. Nor can they deny that the PSP discount reflects – just as Congress contemplated – Petitioner's inability to satisfy more than a fraction (the PSP) of the fair value (the ALV) of present and future claims. *That* is the true nature of the asbestos crisis, and it

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[9] Experts testified at length at the bankruptcy hearing on the *bona fides* of the ALV amounts, which are often lower than those paid by comparable debtors. ALVs were based on aggregate results from *all* cases filed against Petitioner, including those that went to judgment. Statistical modeling endorsed by OSHA, along with mortality statistics, was used to project future claims through 2030. Claims were then broken down into five disease categories. Values for these categories were based on Petitioner's actual payment history, and checked against values assigned to comparable claims in, *e.g.*, the UNR and Johns-Mansville bankruptcies. In sum, there was nothing "notional" about the ALVs, which had nothing to do with crafty lawyers and everything to do with the acknowledged realities of asbestos litigation and the requirements of Section 524(g). *See generally In re Armstrong World Indus.*, No. 00-4471, 2006 U.S. Dist. LEXIS 60561 (D. Del. Aug. 14, 2006) (crediting same experts and approving parallel asbestos plan as comporting with benchmarks).

has been exacerbated by the decision below and obscured by Respondents here.

4. Respondents' objection that they were shut out of the ALV negotiations and the bankruptcy proceedings, Opp. at 2-4, is disingenuous – and foreclosed. The court below expressly held that they "were afforded a reasonable opportunity to participate in the settlement negotiations" but chose instead "to hover in the background of critical settlement negotiations and thereafter resist all responsibility on the basis of lack of consent," which the court would not permit. App. 42a-45a.

5. Respondents' true object is to use Section 524(g) to get themselves off the hook at the expense of asbestos victims whose claims are approved by a reviewing trust. Our *amici* explain how the decision below perversely enables insurers to evade their coverage obligations, in contravention of federal law, simply by virtue of their policyholders' bankruptcies. *See* Am. Br. at 5-9. Respondents are excess insurers whose obligations are triggered by incurred liabilities, not actual payments, that exceed the attachment points specified in their respective policies. *See* App. 5a. Yet Section 524(g)'s central purpose is to ensure that an asbestos trust's other assets are not exhausted until all deserving claimants, present and future, have been paid equally; it requires Petitioner to limit its payouts to present claimants to ensure that future claimants can be paid like amounts for similar injuries. Thus the inevitable effect of Section 524(g), as distorted and applied by the court below, is to relieve excess insurers of their coverage obligations to the extent that the trust's existing assets are husbanded, as required by Congress, rather than actually paid out immediately to beneficiaries whose claims have been allowed by an asbestos trust. Respondents have thus convinced California to disable Section 524(g) trusts from drawing upon insurance coverage such as this for the sake of the beneficiaries, asbestos victims, whom Congress meant to protect.

6. Respondents assert that "no claim was raised in the court below that section 524(g) preempts California

insurance law or abrogates respondents' California-law rights under the policies." Opp. at 9. Nonsense. In its brief below, Petitioner addressed Respondents' contention "that application of 'normal' insurance principles to a § 524g bankruptcy results in total forfeiture of coverage," and argued that this "would eviscerate the very goals of Congress and create an unwarranted windfall for liability insurers." Consolidated Respondent's Brief of Fuller-Austin Insulation Company Addressing the Collective Arguments of All Appellants ("FA Br.") at 2, *Fuller-Austin Insulation Co. v. Highlands Ins. Co.*, 38 Cal. Rptr. 3d 716 (Cal. Ct. App. 2006) (No. B170079); *see also* FA Br. at 2. ("[S]ettled insurance law principles neither encourage nor require the kind of frustration of Congressional purpose sought by the insurers."); FA Br. at 50 ("Because the company does not have enough insurance, the requirements of § 524g force Fuller-Austin to hold back on payments to the earliest claimants in order to assure there will be adequate compensation for later claimants."). There was no occasion there for Petitioner to argue specifically in terms of preemption, for the trial court had created no conflict between California and federal law – only the appellate court did.

Lest there be any doubt that the preemption question is properly posed, the court below expressly acknowledged, per Petitioner's arguments, that the trial court's decision "comports with the goals of 11 U.S.C. section 524(g)" before nonetheless reversing that decision. App. 4a.

7. Respondents also contend that "the petition badly distorts the actual decision below." Opp. at 15. Their folly, if not hypocrisy, is evident from reading the decision itself. Although we are accused of having lifted "a fragment from one sentence of the California Court of Appeal's recital of the *trial court's jury instructions*," with respect to the reasonableness of the ALV amounts as fixed by the bankruptcy court, Opp. at 16, the court of appeals in fact *approved* of those instructions insofar as they "limited the issue of reasonableness *to the ALV amounts*." App. 68a (emphasis added). The court below remanded a different question, one that the bankruptcy court had not addressed

– namely, whether the settlement as a whole, apart from its specific ALV amounts, was unreasonable or collusive. *See* App. 68a-70a. The Petition acknowledges the pendency of that question without seeking certiorari on it. *See* Pet. at 10 n.2, 14.

Respondents also see distortion in our failure to note the holding of the court below that "'the ALV does not reflect Fuller-Austin's legal obligation to each claimant.'" Opp. at 17 (quoting App. 56a). Far from trying to elide that holding, however, the Petition flags it as the gravamen of the Question Presented. Pet. at *i*. Contrary to Respondents' account, this holding has *nothing* to do with the reasonableness of the ALV amounts approved by the bankruptcy court. Instead, the holding was expressly based upon the court's reading of the bankruptcy plan as "permitting the Trust's obligations to be satisfied by payment of the payment sum percentage." App. 58a. Thus, it was based upon misconceptions about how and why an asbestos trust discounts payments below the amount of its actual liability to present claimants in obedience to Section 524(g), which misconceptions the Petition squarely targets, Pet. at 19-24, and the Opposition conspicuously fails to defend.

8. Finally, Respondents claim that the Petition "greatly exaggerates the supposed importance of the decision below." Opp. at 17. The submissions of the *amici* asbestos trusts, embraced by consumer groups, forcefully refute this. A California court has turned Section 524(g) – Congress' lone legislative response to the asbestos crisis to date – on its head, thereby imperiling the statutory regime and the proper operation of any Section 524(g) asbestos trust that depends significantly on insurance assets. Prompt review by this Court would serve the interests of asbestos victims, asbestos defendants, and all others directly involved in the asbestos litigation crisis – save perhaps for these Respondents.

CONCLUSION

The petition for a writ of certiorari should be granted.

September 5, 2006

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In The

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FULLER-AUSTIN INSULATION COMPANY, f/b/o FULLER-AUSTIN ASBESTOS SETTLEMENT TRUST,

Petitioner,

v.

HIGHLANDS INSURANCE COMPANY, *et al.*,

Respondents.

On Petition For A Writ of Certiorari To The California Court Of Appeal, Second Appellate District, Division Two

BRIEF OF *AMICI CURIAE* THE BABCOCK & WILCOX COMPANY ASBESTOS PI TRUST, THE CELOTEX ASBESTOS SETTLEMENT TRUST, THE PLIBRICO 524(g) ASBESTOS TRUST, THE WESTERN ASBESTOS SETTLEMENT TRUST, AND THE COMBUSTION ENGINEERING 524(g) ASBESTOS PI TRUST IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST

The Babcock & Wilcox Company Asbestos PI Trust, The Celotex Asbestos Settlement Trust, the Plibrico 524(g) Asbestos Trust, the Western Asbestos Settlement Trust, and the Combustion Engineering 524(g) Asbestos PI Trust (collectively, "*Amici*") were established under the United States Bankruptcy Code for the benefit of those injured by asbestos-containing materials made, sold, or installed by the bankrupt predecessors of *Amici*. As discussed more fully below, *Amici* were born of the same necessities as Petitioner's trust, namely, to discharge debilitating asbestos liabilities while ensuring fair compensation to all injured claimants. Thus, *Amici* have a strong interest in the outcome of the petition for certiorari filed by Petitioner Fuller-Austin Insulation Company ("Fuller-Austin").[1]

BACKGROUND

The Asbestos Problem

Many attempts have been made over the past twenty-five years to resolve what this Court has called the "elephantine mass" of asbestos cases clogging the tort system today. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999). Millions of tort claims have been filed, alleging

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[1] As required by Rule 37.6 of this Court, counsel for *Amici* state that they authored this brief in its entirety and that no party or parties other than *Amici* made any monetary contribution to the preparation or submission of this brief. As required by Rule 37.2, consent to the filing of this brief has been obtained from all parties. The consents of the following parties were obtained by email: Stonewall Insurance Company, Certain Underwriters at Lloyd's London and Certain London Market Insurance Companies, Brittany Insurance Company, Compagnie Europeene, and International Insurance Company. Copies of these e-mails are being filed with this brief. The consent of the remaining parties was obtained orally. Counsel for *Amici* will file a letter memorializing written consent from the remaining parties.

billions of dollars of personal injury and/or property damage from exposure to asbestos-containing materials.[2] The overwhelming burden of such claims, in terms of both litigation costs and tort liabilities, has so far driven more than seventy companies into bankruptcy, including *Amici's* predecessors and Fuller-Austin.[3]

Crafting a long-term solution to the asbestos crisis is challenging not merely because of the sheer number of claimants and defendants, but because of the long latency period for asbestos injuries, which frequently do not manifest themselves until decades after exposure. *See Amchem Prods. v. Windsor*, 521 U.S. 591, 598 (1997). To pass muster, any resolution of asbestos liabilities must address both present and future claimants (those who have not yet manifested a disease and filed a claim). *See id.* at 610-11, 626-28 (rejecting global settlement of asbestos claims on grounds that it failed to protect rights of claimants who had not yet manifested a disease). In light of the decisions in *Amchem* and *Ortiz*, which likewise rejected a class settlement of asbestos claims for failing to respect the rights of future claimants, the bankruptcy process is now the only allowable way for companies to discharge future asbestos liabilities. Indeed, Congress enacted section 524(g) of the

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[2] For example, shortly before The Babcock & Wilcox Company filed for bankruptcy protection, the number of asbestos-related claims filed against it was over 400,000. *In re Babcock & Wilcox Co.*, No. 00-10992, at 5, 37 (Bankr. E.D. La. Dec. 28, 2005), *available at* http://www.laeb.uscourts.gov/Opinions/pdf/00-10992-7027.pdf. During the Celotex Corporation's bankruptcy, approximately 737,000 asbestos-related bodily injury proofs of claim were filed against the company, alleging more than $200 billion in damages. *In re Celotex Corp.*, 204 B.R. 586, 604 (Bankr. M.D. Fla. 1996).

[3] *See* RAND Institute for Civil Justice, *Asbestos Litigation*, at 109 (2005), *available at* http://www.rand.org/pubs/monographs/ 2005/ RAND_MG162.pdf.

Bankruptcy Code, 11 U.S.C. § 524(g), to lay out the blueprint for accomplishing this goal, and insurance proceeds are an important part of that plan.

Section 524(g)

Amici were created pursuant to bankruptcy reorganization plans under section 524(g), the same provision upon which Fuller-Austin relied as authority for its reorganization plan. As required by section 524(g), these plans provide for the resolution of asbestos-related claims against the debtors and the establishment of *Amici* as the vehicles to pay these claims for the exclusive benefit of asbestos claimants. *See, e.g., In re Celotex Corp.*, 204 B.R. at 602, 604. To this end, the plans transfer various of the debtors' assets to *Amici*, including, among other things, the rights to the proceeds of the debtors' insurance policies. *See, e.g., id.* at 602-03. These policies typically require the insurers to provide sweeping coverage for "all sums" that the policyholders became obligated to pay as a result of, *inter alia*, asbestos personal injuries. In exchange for these assets, *Amici's* predecessors are fully discharged from their asbestos-related liabilities, which are transferred to *Amici*. *See, e.g., id.* at 609-10. *Amici* then pay claimants pursuant to criteria approved by the courts. *See, e.g., id.* at 610, 613.

The non-insurance assets transferred to *Amici* cannot, by themselves, satisfy the billions of dollars in present and future asbestos-related liabilities.[4] Accordingly, section

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[4] Indeed, several companies with asbestos liabilities have cited the importance of their insurance in opposing proposed federal legislation that would require relinquishment of insurance coverage to a federally run fund, along with cash payments, to resolve outstanding asbestos liabilities. *See S. 852: A Fair and Efficient System to Resolve Claims of Victims for Bodily Injury Caused by Asbestos Exposure, and for Other Purposes, Hearings Before the S. Committee on the Judiciary,* 109th Cong. 47-48 (Apr. 26, 2005) (statement of Carol Morgan), *available*

(Continued ...)

524(g) provides that trusts like *Amici* pay, in the first instance, only a percentage of the full liabilities established by each claimant (the "initial payment percentage").[5] Paying each claimant less than the full amount of his claim ensures that there will be adequate assets available for distribution to future claimants. If and when additional assets become available, *e.g.*, if the *Amici* recover insurance proceeds from previously recalcitrant insurers or the claims are fewer than expected, the *Amici* increase the amount paid to claimants (and pay additional amounts to those claimants who already were paid).

SUMMARY OF ARGUMENT

According to the Court of Appeal, once a bankrupt policyholder has received a discharge pursuant to a plan of reorganization, an insurer's obligation is limited to the initial payment percentage, *i.e.*, the amount that trust can initially afford to pay from the assets it has received from the bankrupt policyholder. *Fuller-Austin Insulation Co.*, 38 Cal. Rptr. 3d at 747, 749. This limitation produces perverse results.

Under section 524(e) of the Bankruptcy Code, 11 U.S.C. § 524(e), the discharge of a debtor from its debt does not relieve the obligation of any other entity (*e.g.*, an insurer) that may be liable for the debt. The insurers' policies

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(... Continued)
at http://frwebgate.access.gpo.gov/cgi-bin/useftp.cgi?IPaddress=162.140.64.128&filename=26841.wais&directory=/diskb/wais/data/109_senate_hearings.

[5] The Court of Appeal referred to the full amount of the liability as the "Allowed Liquidated Value," or "ALV," and to the amount actually paid by the Fuller-Austin Trust as the "payment sum percentage." *See, e.g.*, *Fuller-Austin Insulation Co. v. Highlands Ins. Co.*, 38 Cal. Rptr. 3d 716, 724 (Cal. Ct. App. 2006).

similarly provide that the bankruptcy of the policyholder shall not relieve the insurers of their policy obligations.

Section 524(e) plainly prohibits an insurer from reducing its liabilities merely on the basis of its policyholder's bankruptcy and subsequent discharge. Under the Court of Appeal's decision, however, the liability of insurers for the debts of their policyholders turns not on what federal law requires in section 524(e) or on what the insurers promised in their policies, but rather on the amount of non-insurance assets transferred by the policyholder to the trust under the plan of reorganization. Thus, if a bankrupt policyholder had no assets other than insurance to transfer to a trust, and the insurers denied coverage, the trust initially would have no assets with which to pay claims and would have to set the initial payment percentage at zero. Under the Court of Appeal's decision, the insurers could then argue that, because the trust's payment percentage was zero, they would have no obligation to pay anything under their policies. Even if the Trust had non-insurance assets and, for example, could set the payment percentage at 10%, the insurers could still argue under the Court of Appeal's ruling that their obligation was not for the amount of the debt to the injured claimant, but rather for the reduced amount the trust could afford to pay the claimant.

By allowing insurers to limit their liabilities based on the happenstance of their policyholder's bankruptcy and subsequent discharge, the Court of Appeal has disregarded not only Congress's express direction in section 524(e), but also well-established federal case law. *See UNR Indus., Inc. v. Cont'l Cas. Co.*, 942 F.2d 1101, 1105 (7th Cir. 1991) (holding that insurer must pay the amount of the bankrupt policyholder's debt, and not merely what the successor trust can afford to pay).

Thus, the Court of Appeal's decision threatens to strip from existing trusts much of the value of the insurance rights they received from their debtor-predecessors, substantially reducing the amounts available for their beneficiaries, while the insurers obtain a windfall. *See id.*; *West v. White (In re White)*, 73 B.R. 983, 985 (Bankr. D.D.C. 1987). Moreover, the Court of Appeal's decision actually creates an incentive for insurers to deny coverage, force their policyholders into bankruptcy and then argue that their liability should be reduced to whatever the trust can afford to pay. This surely was not Congress's intent in crafting section 524 as a tool for reorganization.

For these reasons, and in view of the fact that this Court has not yet addressed these important federal questions, certiorari should be granted.

ARGUMENT

A. Certiorari Should Be Granted Because the Decision Below Directly Contravenes Section 524(e) of the United States Bankruptcy Code

Section 524(e) of the Bankruptcy Code provides that "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." 11 U.S.C. § 524(e). This provision embodies the long-standing principle of "providing the debtor with a 'fresh start' but avoiding the grant of a windfall to third parties." *In re Bd. of Dirs. of Hopewell Int'l Ins., Ltd.*, 281 B.R. 200, 210 (Bankr. S.D.N.Y. 2002); *see also Lewis v. Mfrs. Nat'l Bank of Detroit*, 364 U.S. 603, 608-09 (1961) (rejecting a construction that "would enrich unsecured creditors at the expense of secured creditors, creating a

windfall merely by reason of the happenstance of bankruptcy").[6]

The decision below, which did not consider section 524(e), would do precisely what section 524(e) is designed to avoid: allow insurers to take advantage of their policyholder's bankruptcy and subsequent discharge to reduce or eliminate their liability for the policyholder's debt.

According to the Court of Appeal, in the event of a policyholder's insolvency, an insurer would be relieved of all of its payment obligations that exceed the ability of the policyholder or a successor trust to pay. As a result, if a trust has no assets other than rights under disputed insurance policies, and therefore initially cannot pay any amount to any claimant, the insurer also would pay nothing under its insurance policy – notwithstanding the fact that, outside of the bankruptcy context, the insurer would have to pay millions of dollars. This outcome is prohibited by section 524(e). *In re Jet Fla. Sys.*, 883 F.2d at 975 (holding that the "fresh start" offered by the Bankruptcy Code "is not intended

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[6] The earlier version of this provision, section 16 of the Bankruptcy Reform Act of 1898 (11 U.S.C. § 34, repealed Oct. 1, 1979), preserved the liability of a party that "is a co-debtor with, or guarantor or in any manner a surety for" the debtor. Section 524(e) removed any such limitation, affirming "the liability of *any other entity* on" the debt of the debtor (emphasis added). Even under the more restrictive language of section 16, courts have maintained that the discharge of a debtor's debts "does not operate to release claims against parties liable with the bankrupt, whether liquidated, as in the case of debts, or unliquidated, as in the case of claims based on torts." *Johnson v. Bondurant*, 359 P.2d 861, 865 (Kan. 1961). *See also In re Bracy*, 449 F. Supp. 70, 71 (D. Mont. 1978) (deciding that "if an insurance company is as a matter of state law liable to a plaintiff in a personal injury action, subsequent discharge of the assured in bankruptcy does not alter the obligation of the insurance company."); *In re Jet Fla. Sys., Inc.*, 883 F.2d 970, 975 (11th Cir. 1989) (citing cases holding same under section 16).

to provide a method by which an insurer can escape its obligations based simply on the financial misfortunes of the insured."); *see also Green v. Welsh*, 956 F.2d 30, 33 (2d Cir. 1992) (language of section 524 reveals that Congress sought to free the debtor of his personal obligations while ensuring that no one else reaps a similar benefit; thus, relief given to debtor by section 524 does not extend to other parties).

In deciding *Jet Florida*, the Eleventh Circuit repeatedly invoked section 524(e) as the basis for an insurer's obligation to answer for liabilities that a bankrupt policyholder itself could not pay. 883 F.2d at 973-76. The debtor's inability to pay either the cost of defending the tort action or the tort liability itself did not alter in any way the insurer's obligations under the insurance contract. Under the Court of Appeal's ruling, by contrast, the bankruptcy and subsequent discharge of the policyholder would magically (and improperly) transform the insurer's obligation to cover liabilities owed by the policyholder into an obligation to cover only those liabilities that the policyholder or its successor trust can afford to cover on its own. Indeed, the Court of Appeal's ruling actually creates an incentive for insurers to deny coverage for liabilities arising from mass torts, drive their policyholder into bankruptcy, and then rely on the decision below to reduce their coverage obligations to the amount the policyholder's successor trust can afford to pay.

Ignoring this perverse incentive, the court below asserted that holding insurers responsible for liabilities greater than what the debtor-policyholder could cover on its own somehow would unfairly award the policyholder a windfall. *Fuller-Austin Insulation Co.*, 38 Cal. Rptr. 3d at 746. Nothing could be further from the truth. As the Petition notes, Fuller-Austin's claimants are initially paid only a percentage of the value of their allowed claims in order to comply with section 524(g)'s requirement that assets

be set aside to compensate future asbestos claimants. Pet. at 9. Thus, additional amounts paid into the trust by the insurers do not provide the trust with a windfall. Rather, such payments make it possible for the trust to increase payments to the claimant beneficiaries of the trust.[7] The same is true for *Amici*.

Moreover, to have insurers cover losses and liabilities that policyholders cannot afford to pay is the *raison d'être* of insurance contracts. *See, e.g., Harbor Ins. Co. v. Cont'l Bank Corp.*, 922 F.2d 357, 368 (7th Cir. 1990) (the point of insurance policies is to eliminate solvency risk). Section 524(e) merely codifies this goal in the bankruptcy context. For Respondents to insist that their obligations are reduced because Fuller-Austin has been discharged from its tort liabilities and the successor trust cannot fully satisfy them misconstrues the objectives of bankruptcy law. As the Eleventh Circuit stated in *Jet Florida*, "[t]he reported cases ... underscore that the purpose of section 524 of the Bankruptcy Code is to protect the debtor and not to shield third parties such as insurers who may be liable on behalf of the debtor." 883 F.2d at 975.[8]

Thus, under section 524(e), insurers remain fully liable on their policies notwithstanding the bankruptcy of their policyholder and the subsequent discharge of its debts to tort claimants.

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[7] Even if all insurance assets are recovered and distributed, it is highly unlikely that claimants of Petitioner and *Amici* ever will be compensated in full.

[8] Indeed, the court in *Jet Florida* went so far as to hold that, notwithstanding a debtor's discharge in bankruptcy, a third party could sue the debtor to establish its liability, in order to collect the debt from the insurer. *Jet Florida*, 883 F.2d at 976.

> Any other outcome would result in a windfall to insurers, which receive premiums as the *quid pro quo* for providing insurance. Any other outcome would also disadvantage both innocent, third-party, personal-injury claimants and innocent general creditors of any bankruptcy estate in which there are assets available for distribution to creditors, whose pro rata share of those assets must necessarily diminish by inclusion of a claim that could be but is not paid by insurance.

In re White, 73 B.R. at 985. Numerous courts have reached the same conclusion. *See, e.g.*, *Green v. Welsh*, 956 F.2d at 32; *In re Catania*, 94 B.R. 250, 251 (Bankr. D. Mass. 1989); *In re Mann*, 58 B.R. 953, 956 (Bankr. W.D. Va. 1986); *In re McGraw*, 18 B.R. 140, 143 (Bankr. W.D. Wis. 1982); *In re Honosky*, 6 B.R. 667, 670 (Bankr. S.D. W. Va. 1980).

Given the well-settled rulings by state and federal courts alike reached under section 524(e) and its predecessor, the Court of Appeal's ruling cannot stand. Allowing Respondent-Insurers to reduce their obligations based on the debtor's bankruptcy and subsequent discharge is anathema to the letter and spirit of the Bankruptcy Code and requires this Court's intervention.

The Court of Appeal's decision likewise conflicts with the Seventh Circuit's decision in *UNR Industries*. There, the insurer made the same argument that Respondents make here – that the extent of its obligations "depends on how much money the Trust actually pays to asbestos victims with valid claims." 942 F.2d at 1105. Unlike the Court of Appeal, the Seventh Circuit rejected this argument, reasoning that it

> threatens to confer a windfall on [the insurer] at the asbestos victim's expense. The reason for the potential windfall is that UNR paid the Trust only a portion of the asbestos victims' actual damages in the bankruptcy proceedings. This discounting of the asbestos victims' damages had nothing to do with the merits of their claims. The discounting merely reflected the amount of UNR's assets that the asbestos victims could reach. [The insurer] may profit greatly from UNR's bankruptcy if its obligations are based on the arbitrarily discounted amount that the asbestos victims actually receive from the Trust.

Id. This conflict between the Court of Appeal's decision and *UNR Industries* warrants the granting of the Petition.

B. This Court Should Grant Review Because the Court of Appeal's Decision Would Eviscerate Section 524(g) of the Bankruptcy Code

As Petitioner's brief ably asserts, the Court of Appeal's decision impermissibly frustrates the purpose of section 524(g), Congress's carefully crafted mechanism for handling asbestos-related tort claims against bankrupt entities. It is well-settled that state law cannot be applied in derogation of federal law. *See, e.g.*, *Perez v. Campbell*, 402 U.S. 637, 649-51 (1971) (remanding matter for determination whether state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress") (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (affirming decree restraining state

officials from enforcing state law found to intrude on federal scheme)). Because Petitioner's arguments are equally applicable to *Amici*, *Amici* adopt those arguments.

CONCLUSION

For the reasons stated above, as well as those set forth in the Petition, certiorari should be granted.

Dated: August 21, 2006

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HIGHLANDS INSURANCE COMPANY, *et al.*,

Respondents.

On Petition For A Writ of Certiorari To The California Court Of Appeal, Second Appellate District, Division Two

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* CONSUMER FEDERATION OF AMERICA AND UNITED POLICYHOLDERS IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE A BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONERS AND STATEMENT OF INTEREST

Pursuant to Rule 37.2(b), the Consumer Federation of America and United Policyholders (collectively, "*Amici*") respectfully move for leave to file this Brief *Amici Curiae* in support of Petitioners. Not all respondents have not consented to the filing of this Brief. In support of this motion, *Amici* state as follows:

The Consumer Federation of America ("CFA") is a coalition of over 300 national, state, and local consumer, senior citizen, labor, farm, cooperative, and rural organizations representing more than 50 million people in matters pertaining to the well-being of the American consumer. CFA has a three-fold mission: to assist state and local organizations, to provide information to the public regarding consumer issues, and to conduct research projects. CFA is deeply concerned about the regulation of the insurance industry and about the appropriate and prompt payment of insurance claims.

CFA also researches consumer issues, behavior, and attitudes through surveys, polling, focus groups, and literature reviews. The findings of such projects are published in reports that assist consumer advocates and policy makers as well as individual consumers. Research supported by the CFA also provides the basis for new consumer initiatives, public service advertising, and consumer information and education efforts.

CFA believes that liability insurance coverage is vital to protect both the policyholder companies and the injured claimants. It is critical that liability insurance be made

available for the benefit of both companies and injured claimants.

United Policyholders ("UP") was founded in 1991 as a non-profit, 501(c)(3) organization dedicated to educating the public on insurance issues and consumer rights. UP is funded by donations and grants from individuals, businesses, and foundations. The organization monitors legal and marketplace developments that impact policyholders and participates in the formation of public policy on insurance transactions. UP offers practical guidance on coverage and claims issues to property and business owners and advocates, including disaster relief personnel, attorneys, and adjusters.

UP previously has appeared as *amicus curiae ("Amici")* in over 130 cases throughout the United States, including numerous cases in this Court. *See Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004); *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355 (2002), *overruled in part by Ky. Ass'n of Health Plans, Inc. v. Miller*, 538 U.S. 329 (2003); *Humana Inc. v. Forsyth*, 525 U.S. 299 (1999); *F L Aerospace Corp. v. Aetna Cas. & Sur. Co.*, 498 U.S. 911 (1990) (denying cert.). UP was the only national consumer organization to submit an *amicus* brief in the landmark case of *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003).

Both CFA and UP are concerned about the adverse impact the Court of Appeal's decision in this case will have on their constituencies. They believe that the issues presented in this case are central to assuring that insurance assets are available to protect policyholders and injured claimants alike with regard to the overwhelming liabilities in the national asbestos crisis.

Thus, *Amici* have a strong interest in the outcome of the petition for certiorari filed by Petitioner Fuller-Austin Insulation Company ("Fuller-Austin").

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ARGUMENT[1]

Amici adopt the arguments set forth in the Brief of *Amici Curiae* The Babcock & Wilcox Company Asbestos PI Trust, The Celotex Asbestos Settlement, Trust, the Plibrico 524(g) Asbestos Trust, the Western Asbestos Settlement Trust, and the Combustion Engineering 524(g) Asbestos PI Trust, submitted to the Court on August 21, 2005.

[1] As required by Rule 37.6, counsel for *Amici* state that they authored this brief in its entirety and that no party or parties other than *Amici* made any monetary contribution to the preparation or submission of this brief.

CONCLUSION

For the reasons stated above, as well as those set forth in the Petition, certiorari should be granted.

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Respectfully submitted,

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